UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
- - -

NORCAL TEA PARTY PATRIOTS, et al.,	:	CIVIL NO. 1:13-CV-341
Plaintiffs,	:	Hearing on Motions to Dismiss
-vs-	:	
INTERNAL REVENUE SERVICE, et al.,	:	Monday, June 30, 2014 10:05 a.m.
Defendants.	:	Cincinnati, Ohio

- - -

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN J. DLOTT, CHIEF JUDGE
- - -

For the Plaintiffs: Edward D. Greim, Esq.
Todd P. Graves, Esq.
Dane Martin, Esq.
Graves Garrett, LLC
1100 Main Street, Suite 2700
Kansas City, Missouri 64105

David R. Langdon, Esq.
Langdon Law, LLC
8913 Cincinnati-Dayton Road
West Chester, Ohio 45069

Christopher R. Finney, Esq.
Finney Law Firm, LLC
4270 Ivy Pointe Boulevard, Suite 225
Cincinnati, Ohio 45245

For the Defendants Internal Revenue Service and Department of the Treasury:
Grover Hartt, III, Esq.
U.S. Department of Justice
Tax Division
717 North Harwood, Suite 400
Dallas, Texas 75201

Joseph A. Sergi, Esq.
Laura C. Beckerman, Esq.
U.S. Department of Justice
Tax Division
555 Fourth Street, NW
Washington, D.C. 20001

Proceedings recorded in stenotype.
Transcript produced using computer-aided transcription.

Matthew Joseph Horwitz, Esq.
Assistant United States Attorney
221 East Fourth Street, Suite 400
Cincinnati, Ohio 45202

For the Defendants Carter Hall, Joseph Herr, Grant Herring, Elizabeth Hofacre, Stephen Seok, Mitchel Steele, and Carly Young:

Pierre H. Bergeron, Esq.
Thomas E. Zeno, Esq.
Lauren S. Kuley, Esq.
Squire Patton Boggs, LLP
221 East Fourth Street, Suite 2900
Cincinnati, Ohio 45202

Jeffrey A. Lamken, Esq.
Eric R. Nitz, Esq.
MoloLamken LLP
The Watergate
600 New Hampshire Avenue, NW, Suite 660
Washington, D.C. 20037

For the Defendants Douglas Shulman, Steven Miller, William Wilkins, Sarah Hall Ingram, Joseph Grant, Lois Lerner, Holly Paz, Cindy Thomas, Bonnie Esrig, Brenda Melahn, and Steven Bolling:

Brigida Benitez, Esq.
Erica Gerson, Esq.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036

Mark T. Hayden, Esq.
Taft, Stettinius & Hollister, LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202

Courtroom Deputy: William Miller

Law Clerk: Beth Mandel

Court Reporter: Julie A. Wolfer, RDR, CRR

- - -

PROCEEDINGS

(In open court at 10:05 a.m.)

COURTROOM DEPUTY: NorCal Tea Party Patriots versus the Internal Revenue Service, Case Number 1:13CV341.

THE COURT: Good morning to everyone.

Let me have just a minute here to get organized.

Okay. I have tried to seat you in an order that I can recall who is who. Let's go through the first table. For plaintiffs, would you just state your name for the record.

MR. GREIM: Your Honor, Eddie Greim from Graves Garrett.

THE COURT: All right. Thank you.

MR. LANGDON: David Langdon, Your Honor.

THE COURT: Mr. Finney.

MR. FINNEY: Christopher Finney.

THE COURT: Okay.

MR. GRAVES: Todd Graves, Graves Garrett.

THE COURT: All right.

MR. MARTIN: Dane Martin of Graves Garrett.

THE COURT: Thank you. All right.

Let's see, DOJ.

MR. HARTT: Good morning, Your Honor. I'm Grover Hartt.

MR. SERGI: Good morning, Your Honor. I'm Joe Sergi.

MS. BECKERMAN: Good morning. I'm Laura Beckerman.

MR. HORWITZ: Good morning, Your Honor. Matt Horwitz.

THE COURT: Okay. Thank you, Mr. -- oh, I see where you are, Mr. Horwitz. You're sort of --

MR. HORWITZ: I'm sort of an extension of the table.

THE COURT: We've just got too many government lawyers. That's what it is.

All right. For lack of a better word, I've been calling you the government management defendants attorneys.

MS. BENITEZ: Good morning, Your Honor. I'm Brigida Benitez, Steptoe and Johnson.

MS. GERSON: Good morning, Your Honor. Erica Gerson with Steptoe and Johnson.

MR. HAYDEN: Mark Hayden with Taft, Stettinius and Hollister.

THE COURT: Thank you.

All right. Then Mr. Bergeron.

MR. BERGERON: Pierre Bergeron, Your Honor, for the line-level employees.

MR. LAMKEN: Jeff Lamken, Your Honor.

MR. NITZ: Eric Nitz, Your Honor.

MR. ZENO: Thomas Zeno. Good morning, Your Honor.

THE COURT: Good morning, Mr. Zeno.

MS. KULEY: Lauren Kuley.

THE COURT: Thank you. Good morning.

All right. Let me just go over with you what -- I

think you all know my law clerk Peggy Fechtel who has done an incredible job of trying to summarize all this for me in 42 pages.

Let me tell you about the organization we think we have worked out for this morning.

What did I do with my glasses?

Bill, somewhere I've lost my glasses.

Oh, here they are. My other ones. I brought the ones that I can really see with. Okay.

All right. What we thought we would do, here's how I'd like to organize the arguments. And I don't want the parties to focus on the personal jurisdiction issues right now. Originally you had told me, I think, that each side wanted about 90 minutes to argue, so using that as our number, and that's not -- I'm not going to time you guys, so, you know, if it goes a little over, fine. I don't have a problem with that. I'd rather hear what you've got to say.

But let's start what I want to start with is the Privacy Act claim, and I thought I'd give 20 minutes to the plaintiffs for that side and 20 minutes to the government defendants and -- for that argument.

Then Count 2, the First and Fifth Amendment claims, what I'd like to do, I'm going to give 45 minutes to the plaintiffs for that, and then to all the three other defendant groups, I was thinking of about 15 minutes each for the

government defendants, the managerial, and the line-level.

Now, if you want among yourselves to rearrange the times, that's fine. I don't have a problem with that at all. You can use it any way you want.

And then finally, on Count 3, the inspection of return information claim, again, 20 minutes for the plaintiffs, and approximately 20 minutes for the government defendants.

So if you all want -- if you want to take a few minutes to talk to each other, it's fine with me, to get organized. Again, I don't have a problem with that. I would have done this ahead of time but we --

MR. BERGERON: Your Honor, we had a plan on division of labor, but I think it will fit within kind of your parameters so I think we can work it all out.

THE COURT: What was your plan, Mr. Bergeron? Why don't you tell me your plan. Maybe it's better than my plan.

MR. BERGERON: Our plan was that the individual defendants would go first and argue Bivens and qualified immunity. We were planning to stay away from personal jurisdiction unless you had questions.

THE COURT: Good. All right.

MR. BERGERON: And that the government would go next and then argue all of the issues specific to the government. But I understand what you're saying is you're wanting to get the plaintiffs' response before we go to the entire argument

for ourselves, so that's fine.

THE COURT: Yes. I'd like to do it issue by issue. I think that's a little easier for me.

MR. BERGERON: That's fine.

THE COURT: Okay.

MR. HARTT: Your Honor, may I clarify?

THE COURT: Yes, Mr. Hartt.

MR. HARTT: We, of course, are the movants. Do you want the plaintiffs to go first?

THE COURT: No, no, no. I'm just saying -- I'm just telling you how much time. No, you're the movants. Obviously you go first.

MR. HARTT: The second question kind of keys off of that one. Are we to have some time for rebuttal at some point?

THE COURT: Yes. Yes. And, Mr. Hartt, would you -- I assume you -- I'd prefer you do it after each of the three issues.

MR. HARTT: Sure.

THE COURT: That's fine. You know, not a tremendous amount of time. I don't want to hear the argument all over again.

All right. Let's start on the Privacy Act claim, and I'll hear from the government defendants. And if you want, if you want to split your arguments, you know, among lawyers or you want one person, I don't care. I don't have any problem

with you -- with splitting.

MR. HARTT: Shall I proceed?

THE COURT: You drew the short straw, Mr. Hartt.

Okay. You may proceed.

MR. HARTT: Thank you, Your Honor.

This morning we're here 13 months after the complaint in this case was originally filed. As the Court, I'm sure, knows, we moved to dismiss the original complaint. They amended. We renewed the motion to dismiss. They amended again. The individual defendants moved to dismiss, and so we're now here really on the second amended complaint.

THE COURT: Okay. Good. That's what I thought we were here on. Great.

MR. HARTT: The Court is certainly familiar with the standards for Rule 12, so I'm not going to dive into those. I do want to comment for just a moment on two important cases, those being the Twombly case and the Iqbal or Iqbal case from the Supreme Court because they relate to the Privacy Act and all we're going to do this morning in very important ways.

In Twombly, the Court through Justice Souter said it was time to retire the more relaxed standard for judging motions to dismiss than Conley versus Gibson. In fact, the Court imposed a more rigorous standard on plaintiffs. And it's important in looking at those cases to note that in both those cases, the plaintiffs have actually made a series of very

detailed allegations. The Court ultimately held they were not enough, not sufficient.

The other point, the Court in both of those cases was very clear that permitting plaintiffs discovery to cure defects in their complaint either under phase discovery or limited discovery was not appropriate. That, Your Honor, is very important to this case because this case is really all about discovery. You can see that as a recurring theme in the complaint. You can see it if you go to their Sue the IRS.com web site. It's a theme there also. Basically what they want to do is to come in behind the Congressional committees who are investigating these various allegations of targeting, so forth, and conduct their own sweeping set of discovery as well. We don't think that's appropriate at all. The abuses from discovery are chronicled very clearly in both of those Supreme Court decisions.

The other point, this is from Iqbal, the second case where the Court reiterated the more rigorous standard, the Court said next we consider the factual allegations in the complaint to determine if they plausibly suggest an entitlement to relief. And that, Your Honor, is the essential task for the Court in this case. Over here on one side, we've got a number of allegations. Over on the other side, we have their various causes of action. But the pervasive problem in this case is that the allegations they are raising do not fit the causes of

action they have pled, even after several amendments. So the question is then does any combination of these allegations support the causes of action they assert as the grounds for their relief and does the Court have jurisdiction over those causes of action.

One more preliminary matter, just so we're starting on the same page. The Court may recall in one of our telephonic hearings we got into a discussion of the difference between a 501(c)(3) organization and a 501(c)(4). I'm not going back through that. It's important to understand, though, that a (c)(3), a tax-exempt organization, basically doesn't pay income tax on its income, and people make donations to it, get to deduct what they contribute. A 501(c)(4), however, a community organization, is permitted certain political activities not allowed to a 501(c)(3) so long as the political activities are not more than half of its operation, commonly understood to be 49.9 percent.

Let me turn now to the Privacy Act specifically. Somewhat ironically, what these plaintiffs, these plaintiffs, are asking this Court to do is to judicially amend a statute passed by Congress to add language that Congress did not include. The plain language of the statute explicitly limits the Privacy Act to individuals. Yet when it serves the plaintiffs' purpose, they ignore the plain meaning rule and here they come asking this Court to expand the statute to

include organizations. Their complaint is very clear in identifying each of these ten plaintiffs as an organization, not an individual. Accordingly, the plaintiffs lack standing.

Plaintiffs first try to finesse this problem by saying they have representative capacity. That means, I think, a collection of individuals. But as we point out in our briefing, the Courts have consistently not accepted this theory in a factual setting in anything resembling the one in this case.

Then they tried a variation. They come in and they say, well, we have associational standing. Associational standing is a judicially created concept. We believe that it should not trump the statute by which Congress waived in certain circumstances sovereign immunity. In other words, we think a waiver of sovereign immunity should only come from Congress. It is elementary as well that when we're dealing with a potential waiver of sovereign immunity, that that waiver is to be narrowly construed in favor of the government and against the finding of a waiver.

But even if the Court were amenable here to finding associational standing, there are still absolute barriers in this case that block its application. The case that everyone looks to when you start talking about associational standing is Washington State Apple Advertising Commission. But there are problems for these plaintiffs trying to come in with that case

or within that case or the cases construing it. First, the requests for information from the IRS that are talked about quite lengthily in this case were not made to individuals. They were made to the organizations.

Second, they can't establish that the individual members who got -- who did not get the request have standing themselves. Accordingly, if the individuals never had standing since they didn't receive the request, they can't then bootstrap their way into associational standing on behalf of the organization.

Next, plaintiffs can't establish that their individual members were damaged. But even to try to do that, they would then have to have the individual members participate. And it's very clear that under the concept of associational standing, if the participation of the individuals is required, then you don't get to associational standing. It voids the concept.

Plaintiffs try to get around that problem by telling the Court that each proposed individual member could simply be given a thousand dollars and they can go away. But as we pointed out, and they admitted in their response, each and every individual must prove some actual damage before it's entitled to even the minimum amount. To do that, of course, we're back to having the individuals participate, and that in turn is lethal to the concept of associational standing.

Last year in another Supreme Court case, Clapper

versus Amnesty International, the Court discussed the concept of Article III standing and explained that it is based upon the separation of powers and that it, quote, serves to prevent the judicial process from being used to usurp the political branches.

That, Your Honor, goes to the heart of this case. There is no jurisdiction, no standing under the Privacy Act. This Court should not accede to their request, start adding language to the statute that Congress passed, and it should dismiss the Privacy Act count.

THE COURT: Thank you, Mr. Hartt.

Who wants to argue on behalf of the plaintiffs? Mr. Greim.

MR. GREIM: Yes. I want to argue and I will be arguing for the -- for all these different points today.

THE COURT: Oh, aren't you lucky.

MR. GREIM: That's right.

THE COURT: You drew the very short straw.

MR. GREIM: Well, I like the breaks in the scheduling. I can have a drink of water and, you know, reorganize my thoughts.

Well, Your Honor, I will keep this, I think, limited in a similar way to what Mr. Hartt did. I think the briefs do address a lot of this. But I have a couple of responses that sort of go to the overall case.

You know, we're at the motion to dismiss stage, so we're in Twombly and Iqbal territory here, and we have to have stated a plausible claim. We amended our complaint twice. We did that because, you know, I'm willing to admit that the information we have is coming from Congress. It's coming from the documents that are coming out during this investigation process. Most taxpayers don't have that benefit. They are dealing with sort of a black box. They get a letter every six months or nine months, and then they don't know who's dealing with them and they don't know what's happening. And so one reason we have this case is because of the Congressional investigation.

But there's no doctrine in federal law that says that we should not have -- a citizen should not rise up to use the courts. Article III says that courts are here to, you know, resolve cases or controversies. And the most fundamental of those are ones arising under the Constitution and federal statutes, and that's what we're here to talk about today.

There is a notice of supplemental authority that we filed, Your Honor. It doesn't deal with the Privacy Act, but it's the Z Street case from the District of Columbia District Court. And the government filed their response to our notice of supplemental authority. That is an important case because it deals with a very similar situation. A group of several pro-Israel Jewish groups alleged that they were targeted in the

exemption process, and as a result, they, you know, they dealt with the viewpoint discrimination with the burdensome request and with the delays, the same sorts of issues that we have here. And once again, in that case the IRS came up and said, you know, there's just no way to recover. There's no way to get injunctive or declaratory relief. And the District of D.C. was very, I think, very strong in their rejection of those arguments. It quoted an important Circuit case from the D.C. Circuit that said, you know, for the IRS, the tax system is a closed loop and everything it does is within its taxing authority. That's the Cohen case, and we've cited all these in the papers. But I think that's the way to look at the different arguments we'll be addressing today.

Let's talk about the Privacy Act, Your Honor.

First of all, this -- I think the thing we're talking about here today is associational standing. That's always been the plaintiffs' position, that we're here based on associational standing, and it does not require doing any violence to or amending the statute. In fact, most times that someone brings an associational standing claim, it's because the actual person who initially could have brought the claim is an individual.

Associational standing simply means that the association is bringing the rights that belong to the individuals. You know, its close cousin is a class action. We

don't say that a plaintiff class is sort of like a corporation bringing the class's claims. We say instead that counsel are in here under Rule 23 bringing a claim on behalf of all the individuals and then you have subclasses and it goes on. Associational standing is sort of the relative of that. And so it's very true the Privacy Act says that individuals are the ones to bring the claims. There are other federal statutes that also say, you know, actual, natural people are the ones who have rights and are the ones who are to bring claims.

We actually cited one of those cases in our brief, the New Jersey Protection and Advocacy Act. The statute there was I call it IDEA. People that practice in this law probably have some other way to call it. But basically that statute gives children and parents the right to sue under IDEA for problems with remediating issues with disabled education. And there, a group is able to bring a claim on behalf of all the individuals to remedy problems with New Jersey's system for helping out these kids.

That's the same thing we have here. Individuals have claims under the Privacy Act. An association can come in and say, look, you have caused us to give you information about individuals that you shouldn't have, and so we're going to come in and we're going to seek damages on their behalf.

Now, I just said the word "damages," and I think probably this is the crux of the whole associational standing

issue. Most cases look at this and say, wait a second, if you're asking for damages, you do have to -- you have to bring in these people so that we can see, you know, were they damaged and how much was it. Now, that's a little bit of an attenuated issue here because as long as you can prove actual damage, the Privacy Act allows for a minimum of $1,000 per plaintiff recovery and it allows for attorneys' fees and things like that. But plaintiffs recognize that that does not make the damages issue go away because after all, you still need to prove actual damages even before you get to the $1,000.

Well, in this case this is how it would work, I mean, it's a very simple process. We can look and see what the disclosures were that each plaintiff in this class had to make to the government. We can literally pull those disclosures, which in many cases name and identify the activities, the First Amendment conduct of the individuals. Now, that's the core of the Privacy Act claim. The individuals didn't give it to the government. Their association gave the information to the government in these follow-up requests that came from the IRS.

And so what you would do, Your Honor, is you would take every individual whose ident -- whose First Amendment activities were identified in these discloses, so, for example, you might say we had a meeting on June 5th in Fresno and the following individuals were there and they gave out these pamphlets and they discussed, you know, there's a lot of rage

about ObamaCare in this meeting; we talked about it a lot. So now you have disclosed information about the group and about the activities of those people named.

The next step, Your Honor, is then to go and see what was the cost. What was the cost of sending that information in to the government. There is a cost associated with that, and we pled that in our complaint; that the cost of complying with these requests is X amount.

The final step you'd need, and bear in mind none of this requires individual participation, is to simply determine which of the individuals who were named contributed to the group for the cost of that disclosure. So you don't have to have a plaintiff come in and say, you know, I had emotional distress when my neighbors learned I was at this meeting where we talked about this or that. You don't have to go into those kind of individualized damages. The damages, Your Honor, are simply the cost of complying with the unnecessary requests that identified them, and at that point you can simply calculate pro rata what that was.

THE COURT: I was going to say, then how do you put it -- how do you propose putting in the cost if you're saying you're not going to get testimony?

MR. GREIM: Well, you don't -- the group itself has records, just like the group had records of its activity, had to give those to the IRS. So the last piece is simply the

group's own record of its -- of the contributions from the individuals, and you just simply -- you simply need to match that list with the list of people who were disclosed in the materials, and that is an element of damages. At that level you don't need a plaintiff to come in again and say that they experienced some sort of distress that neighbors found out about it because that's not -- those are not the damages we're seeking.

Now, frankly, and it's unlikely, in fact it's probably impossible, that any single plaintiff's damages is over $1,000. But by using those facts, you will have established actual damage for each plaintiff. The actual damage is the amount they had to pay to their group to respond to these requests for information that disclose their First Amendment activities.

THE COURT: And you're going to pro rata figure out what they had to pay to the group for the group to comply with these requests.

MR. GREIM: That's right, Your Honor. It doesn't require individual participation. All it does is it establishes actual damage. And so by -- and you won't get to a thousand dollars, but you will have established actual damage. You know, we've pled quite a bit in terms of damages that we want for individuals, but limited in this way, it does not require testimony from every individual of every group.

And again, this is a class action. I mean, we're

trying to address a wrong that happened nationwide to many people, to many different groups, and to many members of many groups. And it's not crazy in a class action to eventually when you have to come up with damages for individuals to find some common-sense method that actually does address the harm that individuals suffered and that can be efficiently handled in one court rather than having each individual person who learns that their name was submitted file Privacy Act claims all over the country. And so that's the benefit of the class action device. That's the benefit of associational standing using the Privacy Act in that way. And that's what federal courts are for.

There's undertones, I think, in the government's argument that this is just a political fight, people are just treading in the wake of Congress, it's everything we see in the media, and now we just have sort of a case that's trying to say me too, you know, bring us along. But if this doesn't happen, if this case doesn't go forward, if these remedies are not taken care of in this case, then we have to rely solely on Congress; and what are all these statutes for, what is Bivens for, what are federal courts for if not to remedy constitutional and statutory violations.

THE COURT: Thank you, Mr. Greim.

Mr. Hartt, do you wish to rebut?

MR. HARTT: Let me just take this point by point, Your

Honor.

First of all, whatever happened with the IRS alleged targeting of people of certain political views does not support a claim under the Privacy Act.

He talked about Z Street and about Cohen. We will have plenty to say about those in the context of the cause of action pled today where they relate. Neither Z Street nor Cohen has anything at all to do with the Privacy Act. The Privacy Act is not a part of this case at all.

He, two points, got into class action analysis, says it's a cousin of associational standing, and then at the end starts talking about need to go forward with the class action. We've been through this already, Your Honor. The Court's made its decision of not getting to class action unless and until the Court finds some underlying cause of action that should go forward.

He then talked about the statute in New Jersey. Well, the easy answer to that is we're not in New Jersey. They're suing in United States District Court. We all know District Courts are courts of limited jurisdiction, and it is the plaintiffs' burden to show some plausible cause of action if they're going to stay in court.

Then we got into the discussion about damages and a hypothetical about a group in Fresno, which, of course, is just a hypothetical. It also assumed that all of the requests made

by the IRS were improper. And that's an assumption that's, well, it's more than a bridge too far, Your Honor. That's a causeway too far. It's crucial because it shows that this hypothetical is not going to work out the way they presume in real life.

We are going to have to probe the individuals they discussed in their hypothetical to find out how much each and every one of them suffered from whatever group request was made to their particular organization. It is impossible, he says, that any single individual suffered more than a thousand dollars of damage. That, Your Honor, is a significant admission. It illustrates again we made -- the point we made at the beginning. This is meant to be a ticket to discovery. But the ticket to discovery cannot be used unless and until there's a viable cause of action.

It could not be any plainer that the Privacy Act is limited to individuals. Congress could have included organizations. It did not. And we respectfully submit that it is not for this Court to add what Congress left out.

THE COURT: Thank you, Mr. Hartt.

Peggy, any questions?

MS. FECHTEL: I would, actually, yes.

THE COURT: Okay. Go ahead.

MS. FECHTEL: My question for Mr. Greim, I'm not following your damages example. If, for instance, you've got a

group in Tulsa, ten members got together, exercised their First Amendment rights, and they have to disclose about that particular event in response to an IRS question. I'm trying to figure out whose damage you're talking about because that question from the IRS went to the group. So the group looks at its records and says persons, you know, A through -- I don't know what the tenth letter of the alphabet is -- A through H were at this meeting. Are you saying that alone caused a monetary damage, just the fact that the group wrote down their name, and that's why A through H don't have to -- persons A through H don't have to participate? Would you with a very specific example tell me how you -- what the damage is and how you prove that damage without an individual's participation?

MR. GREIM: Right. That example is a good starting point. So let's look at the ten individuals who were disclosed. Let's cross-reference that -- and, again, this does not require the individuals' participation -- with the people that actually gave money to the group, okay, to pay for the response because that is one pled element of our damages.

Now, damages for some individual could be higher than that. And, by the way, I don't mean to suggest that no -- that using other measures of damages, no individual is over a thousand dollars. But using that by itself, the cost of compliance of answering -- let's say it was, you know, $275 to answer the part of that request that is unnecessary for tax

administration purposes. We see that ten people's names were disclosed. We then see that six of those each chipped in $50 to pay for this, $50 to the organization. Then we do a pro rata and we figure out that of that $50, thirty-seven fifty is actual money that the individuals had to pay to fund the unnecessary disclosure about their activity.

MS. FECHTEL: So you're saying who is individually damaged, the person who gave them money to answer the questions or the people who were disclosed as having been at the meeting? Or are you saying they could be in both of those groups?

MR. GREIM: Well, they're both damaged, but I'm saying for purposes of associational standing, to allow -- and this is the third prudential prong of associational standing -- to satisfy that third prong, the people whose claims will be addressed in this case will be those who actually paid money to the group for purposes of responding to it. I'm not saying the others weren't damaged as well, but I'm saying that for purposes of this claim, for purposes of being able to assert associational standing, that we limit it to those who actually paid in money to the group for that response.

MS. FECHTEL: So the people who paid money possibly months before whose money is now being allocated for the purpose of responding to the IRS instead of to some other protected activity?

MR. GREIM: That's right. And we don't need the

individuals' testimony to be able to determine what that is. Now, we might need testimony from a representative of the group to explain what money came in, who did it come in from, and where was it used. But that is not individual testimony. That's just testimony of the officer who is able to -- the person with knowledge of the entity.

MS. FECHTEL: Who's going to explain the bookkeeping and who donated money and how that money was spent?

MR. GREIM: They would. And that would be an issue with any claim, even with an individual who spent a lot of money on a lot of things and had to go out and parse out what parts of their expenses were for these requests. So, again, this doesn't require the individual participation if we're going to rely heavily on the third prong of associational standing.

MS. FECHTEL: Okay. Thank you.

THE COURT: Thank you.

Mr. Hartt.

MR. HARTT: The problem with the analysis is a series of assumptions.

THE COURT: Wait.

MR. HARTT: A series of assumptions. I beg your pardon.

THE COURT: Just stay within 12 to 18 inches of the microphone because my court reporter and I aren't going to hear

you if you don't.

MR. HARTT: Certainly, Your Honor.

THE COURT: It bends. You can move it.

MR. HARTT: All right. I'm trying to.

THE COURT: There.

MR. HARTT: Okay. What I was saying is that the response assumes several things. It assumes that Mr. Jones in Tulsa was damaged in the same way that Miss Smith in Tulsa was damaged in the same way that Mr. and Mrs. Brown in Tulsa were damaged.

Moreover, to do the pro rata analysis, at least as I understood what he was saying, you're going to have to know how much each of them contributed. Now, that assumes you're going to have adequate bookkeeping or we don't have to go to each individual and say, you know, did you contribute a hundred dollars in October and then as the election in November got close, you put in 500. Maybe Mr. Jones didn't put in that 500. I don't know. It also perhaps would get us into whether there were nonmonetary contributions.

There are all kinds of problems here that simply cannot be solved unless you had the participation of each of the members. And that gets us back to the flaw inherent in trying to do organizations when Congress said individuals.

THE COURT: Thank you.

Anything else, Peggy?

MS. FECHTEL: No.

THE COURT: Okay. Let's move on, then, to the First and Fifth Amendment claims.

And, by the way, I never keep people seated for more than an hour-and-a-half, but if anybody needs a break before then, just let me know and we'll -- I'll be glad to take a break.

Okay. Let's see. Who wants to start, the government -- okay. All right. The management employees. All right. No, I got it.

Ms. Benitez.

MS. BENITEZ: Thank you, Your Honor.

Your Honor, the individual defendants move to dismiss on two grounds. One is that a Bivens claim is not proper against IRS employees; and, two, the individual defendants are entitled to qualified immunity. And we believe the resolution of our motion to dismiss is very straightforward.

THE COURT: You say -- I'm sorry. You're saying individual defendants.

MS. BENITEZ: Individual defendants.

THE COURT: Do you mean all of the individual -- do you mean line-level and management?

MS. BENITEZ: I do for purposes of the motion, but I am speaking only on behalf of the management defendants.

THE COURT: All right.

MR. BERGERON: And I'll chime in after she's done.

THE COURT: Okay. Thank you.

MS. BENITEZ: First, the plaintiffs do not have a proper Bivens claim. Bivens claims are unavailable against IRS employees because the Internal Revenue Code provides a comprehensive remedial scheme enacted by Congress for aggrieved taxpayers.

The Supreme Court has held that Bivens remedies are unavailable where the design of a government program suggests that Congress provided an adequate remedial scheme to address potential violations. The Internal Revenue Code has been found to be such a remedial scheme.

There is controlling Sixth Circuit precedent directly on point. In Fishburn v. Brown, the Sixth Circuit ruled that a Bivens claim is not available against an IRS agent in that case for violations of due process. And Circuit Courts throughout the country have also ruled that Bivens does not extend to IRS employees because the Internal Revenue Code is a comprehensive remedial scheme.

THE COURT: Are there any cases to the contrary?

MS. BENITEZ: The only cases to the contrary are ones where there have been some form of law enforcement component. It seems -- and outside the Sixth Circuit. So there are cases in I think every other Circuit, including those very Circuits, where in the context of tax collection, in the context of tax

audits, in the context of sort of other types of assessments there has been found that the Internal Revenue Code is such a comprehensive scheme such that Bivens cannot extend to it.

Bivens itself involved a violation of the Fourth Amendment by agents of the Federal Bureau of Narcotics, and in the more than 40 years since Bivens was decided, the Supreme Court has been very reluctant to extend -- to extend Bivens to any new context or any new category of defendants. And, in fact, the Supreme Court itself has only allowed a Bivens claim in two contexts, neither of which would be applicable here, one being employment discrimination in violation of the Due Process Clause, and the other is violation of the Eighth Amendment by prison officials. So every Circuit that has considered the appropriateness of a Bivens remedy in the taxation context has uniformly declined to permit one.

Plaintiffs here have cited no authority that supports their position to apply Bivens to the context of IRS tax determinations, much less to allege constitutional violations for handling applications for tax-exempt status. And plaintiffs have dismissed Fishburn in a footnote by saying that its rationale applied only to one section of the Internal Revenue Code. That would be Section 7433 of the Internal Revenue Code. And that involves tax collection cases, so they argue the rationale is inapplicable here. But that doesn't really make sense with Section 7433 is part of the Internal

Revenue Code, and that's the -- what is the comprehensive remedial scheme.

What the Sixth Circuit referred to in Fishburn was not just 7433 but the Internal Revenue Code as a whole. And in fact, as the Fourth Circuit stated in the Judicial Watch v. Rossotti case, and I quote, "It would be difficult to conceive of a more comprehensive statutory scheme or one that has received more intense scrutiny from Congress than the Internal Revenue Code."

And the Internal Revenue Code contains sections to address potential misconduct by IRS employees. It includes damages remedies in limited circumstances against IRS employees as well as provisions for Inspector General to investigate claims made for alleged misconduct against IRS employees. Certainly Congress considered a number of different types of remedies.

It seems that the plaintiffs' only other argument was that they had no adequate remedy under the Code. They are, in fact, seeking a remedy under the Code. But whether they have a remedy is not the question because the Supreme Court has made clear that the rationale applies even if a plaintiff has no remedy. And so in Bush v. Lucas, for example, the Supreme Court refused to create a Bivens action, even though it assumed in that case that the First Amendment violation had occurred and acknowledged that the plaintiff would not have a remedy,

would not get complete relief. And in that case, the Court said: The question is not what remedy the Court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been construed step by step with careful attention to conflicting policy considerations should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

And Courts have noted that judicial deference is appropriate to indications that Congress's failure to specifically include a remedy has not been inadvertent. And, in fact, the Sixth Circuit in Fishburn noted that although the damages provision in the Internal Revenue Code does not mention constitutional violations, the Court said, quote, "These carefully crafted legislative remedies confirm that in the politically sensitive realm of taxation, Congress's refusal to permit unrestricted damage actions by taxpayers has not been inadvertent."

Secondly, plaintiffs cannot overcome the qualified immunity of the individual defendants. Qualified immunity protects government officials like the current and former IRS employees from liability. And the standard is whether a reasonable person in the official's position could have believed his or her conduct to be lawful in light of clearly established law and the information the official possessed. The plaintiffs have to allege every part of that standard, and

they don't come close to doing so. The plaintiffs have to allege the wrongful actions of each individual defendant, not just knowledge, not just that a defendant supervised someone who did something wrong. They have to allege personal action by each defendant. The plaintiffs have to allege that each individual defendant acted with the purpose to violate each plaintiff's First Amendment or Fifth Amendment rights. They have to allege that they had a clearly established constitutional right both under the First Amendment and the Fifth Amendment. They have to allege that each of the -- that each individual defendant violated that clearly established right. And they have to allege it under an objective standard each individual defendant should have known that they were violating a clearly established constitutional right.

That is deliberately a very heavy burden. In applying that standard, the Sixth Circuit stated in Ecclesiastical Order of the Ism of Am v. Chasin, a case that is factually similar to this one, the plaintiffs had not met their burden. And in that case, a religious organization sued individual IRS employees for alleged violations of the plaintiffs' First and Fifth Amendment rights in connection with a denial of tax-exempt status. In ruling that the individual defendants were entitled to qualified immunity, the Sixth Circuit stated that the IRS and its employees have statutory authority under the Internal Revenue Code to investigate and determine the plaintiffs'

claims of tax-exempt status. The same rationale appears here.

Plaintiffs have simply failed to meet their burden. They've failed to allege that there have been violations of clearly established constitutional rights or that any of the individual management defendants personally and purposely violated those rights. Their amended complaint contains only summary and vague conclusory statements, not the factual allegations that are required. And as such, they cannot overcome the individual management defendants' qualified immunity. So for these reasons, the plaintiffs' Bivens claim against the individual defendants should be dismissed.

I'd be happy to answer any questions, and I would like to reserve a little time for rebuttal, if needed.

THE COURT: Okay. If there is no Bivens claim against the individual defendants, does the Court then need to rule on qualified immunity, or does that constitute a ruling on the qualified immunity?

MS. BENITEZ: It could be, and Courts have done it different ways, but if there's no Bivens claim available, then I think that claim would simply be dismissed and need not reach qualified immunity.

THE COURT: All right. And then the issue of qualified immunity, there is a right to appeal. What happens if the Court rules on qualified immunity? Does this case go up or does it go up in part? What happens?

MS. BENITEZ: I believe it would go up in part because that issue would be immediately appealable.

THE COURT: Okay. Thank you.

MS. BENITEZ: Thank you, Your Honor.

THE COURT: Peggy, any questions?

Wait, I'm sorry. Ms. Benitez.

MS. FECHTEL: To follow up, but if the Court were to never get past the Bivens issue and say -- is the Court saying we're not addressing qualified immunity, or does the Court also have to address qualified immunity? You know, I guess we're asking if the Court thinks that Bivens is dispositive, is there an immediate appeal?

MS. BENITEZ: The qualified immunity issue has been sort of designated by Courts as a threshold issue, and so certainly that would be one that the Court could take up even instead of Bivens as a first -- in the first instance. And that would be immediately appealable.

MS. FECHTEL: I'm trying to just figure out how the interplay of the two. If there is no cause of action, then it would seem that you never get past that first question, was their right violated? I mean, is that -- I mean, is that the way you look at it? Analytically, if there's no cause of action against these individuals because there is no Bivens claim here, what is the analytical framework for addressing qualified immunity?

THE COURT: Thank you.

MS. FECHTEL: It seems strange to get into a question of whether rights were clearly established if you're saying you can't bring the claim anyway.

MS. BENITEZ: Well, and that's why -- I have seen Courts do it both ways. But the qualified immunity can be the threshold issue that the Court can address in the first instance; and if there is qualified immunity, then the Court need not even reach the Bivens issue.

THE COURT: What if we do Bivens first?

MS. BENITEZ: The question is if you do Bivens first, then presumably you do not reach qualified immunity --

THE COURT: Then there's no appeal.

MS. BENITEZ: -- then there's no appeal.

MS. FECHTEL: Or is it inherently that there is qualified immunity because clearly there could be no clearly established right violated because you can't bring the claim in the first place? Is it implicitly a ruling on qualified immunity?

MS. BENITEZ: In some ways, yes. I mean, they're, you know, they're two different arguments, but they are -- in some ways they mesh because there is, you know, the qualified immunity is one that means these individual defendants cannot be sued for these actions. And so it happens to be that there's a claim under Bivens and sort of they -- the two things

sort of mesh analytically, I think.

THE COURT: Peggy and I have gone back and forth about this already, so it's nice to have somebody else to question about it. Thank you.

Mr. Bergeron.

MR. BERGERON: Good morning, Your Honor.

Just to pick up on a couple points there. Our perspective is if you rule on Bivens and say there is no cause of action under Bivens, it obviates the need to go into qualified immunity. And I think under the Bivens analysis, I don't believe that's going to be immediately appealable unless the Court disposes of the whole case.

I'm just going to chime in and pick up on a few points and try not to duplicate everything that was just argued.

Obviously, the reason we're here, Ms. Benitez and myself, is because they're suing these individuals for monetary damages, and we're representing them in their individual capacity. So the question is do you extend Bivens in this type of claim.

Your Honor, the Supreme Court has not extended Bivens since I was in kindergarten. It's been a long time. And the Court has --

THE COURT: You can't say "since I was in kindergarten." Mr. Bergeron, you are young.

MR. BERGERON: It was 1980, Your Honor.

And the Supreme Court has cautioned and the Sixth Circuit has cautioned and said we shouldn't be extending Bivens into new contexts.

So the question is what have the plaintiffs shown you as to the applicability of a Bivens claim here, and the answer is they haven't. They had 80 pages. We don't see a single case.

And to respond to your question that you asked Miss Benitez, there were two cases that we found, and we disclosed them in a footnote in our brief. They were both from the Eighth Circuit. It was footnote five in our brief where the Court seemed to recognize a Bivens claim in the tax collection context. But subsequent Courts have rejected that analysis, and those Courts that have rejected that analysis are building on Judge Jones' opinion in Fishburn. When that came down in 1997 and said no Bivens claim against IRS agents, granted, it was due process context, it was not First Amendment, but the subsequent cases that have confronted this very issue against IRS agents in the First Amendment context have relied on Judge Jones' opinion in Fishburn and have refused to recognize a Bivens claim.

THE COURT: That was Judge Jones in Fishburn?

MR. BERGERON: It was. It was.

THE COURT: Thank you.

MR. BERGERON: And those are the Hudson Valley from

the Second Circuit and the Judicial Watch case from the Fourth Circuit. And what's remarkable is these are cases right on point. You can't get any more on point than that. And they don't even talk about them, Your Honor. Not a single word.

And the Sixth Circuit continues to rely on the Fishburn analysis. The Sachs case that we cited, it was unpublished. It was a Judge Cole decision. But clearly, Fishburn is good law in the Sixth Circuit and it has been adopted by other Circuits who are applying it in this very context.

Mr. Greim said earlier in his argument, oh, the problem is we'd have to rely solely on Congress. Well, that's the whole point. The whole point in Bivens is when you have a comprehensive scheme like this, you have to rely on Congress. And what the Sixth Circuit said just a few months ago, and I'm probably butchering the pronunciation, the Krafsur case, K-R-A-F-S-U-R, says it doesn't really matter whether the Congress provided complete relief, considerable relief, or a little relief. What matters is they have an entire framework here and you have some remedy. Now, they say it's not the remedy we want; we want something else; gosh, we'd be litigating with our hand tied behind our back. You know what, that's Congress's determination. They have to make the competing policy determinations here.

And they have -- you know, I think what's interesting

here, and this is what these cases rely on, they have a specific provision about suits based on misconduct by IRS agents. But you know what, the remedy is against the United States. The remedy is not against the individual agents. And there is a reason for that. And I think the reason here, just to show the practical realities of this, when I was reading their opposition at page 41, there is a heading and it's leading into a description of my clients. It says, "Cincinnati Managers and Line Workers Who Did the Paperwork." They're suing our clients for doing paperwork, Your Honor. And these are -- you see the org. chart. We're at the very bottom of the org. chart, and yet what you are saying is you are going to be individually liable for sending a letter to these guys, for shuffling some papers around, for following the instructions of your superiors? I mean, you're never going to get anyone who is going to work at the IRS if that's the result here. And that's exactly what Bush v. Lucas was talking about in 1983 about the inability to hire public servants if they have to operate with the threat of personal liability.

And here in particular, and this bleeds over into the qualified immunity context, but it's not like we're talking about a black and white analysis under the actual statutes to determine what level of political activity is sufficient because it -- I mean, and that's what those reports that they attach to their complaint, they chronicle. They say, well,

part of the problem here is that there is no bright line rule and there's ambiguity in the statute as to how much political activity you can engage in and still be tax-exempt or 501(c)(4). Well, that means someone has to analyze that. And that's what happened here.

And they can say all they want it was discriminatory intent. There's not a single allegation that any of my clients had any animus against them or any other inappropriate intent. And if you look at their own descriptions, Your Honor, of what these organizations do, one of them says it identifies and encourages candidates to run for office. One says it's going to make donations to influence the selection of individuals to public office. They're going to host candidate forums. They're going to increase public awareness of legislators. Well, that's all political activity. And at some point, these organizations, if they're engaged in too much of that, simply don't qualify for nonexempt status. So someone has to analyze and inquire and say, you know what, are you really a nonprofit or are you just, you know, a super PAC in disguise?

And, you know, we want the IRS to be suspicious, right, because if they just roll over and say, oh, well, someone says they're nonexempt -- they're exempt, then -- then they're exempt, then everyone bears the burden of that. And they can't be walking around looking over their shoulder thinking, my goodness, if I send a request out, am I going to

get held personally liable. And particularly for line-level employees, Your Honor, I mean, even a nominal judgment can be ruinous financially.

So the question is would a reasonable officer have understood that doing the paperwork here would clearly violate established First Amendment law, and the answer is no. And the Supreme -- the Sixth Circuit has made clear -- the Bray case that we cited in our reply brief just came out a couple months ago. It said they were analyzing a fairly colorful case with -- I won't get into all the background. But basically the Court said because the legal and factual scenario presented in this action is not identical to any of the Sixth Circuit or the Supreme Court has previously addressed, the rights were not clearly established and a reasonable officer could believe his conduct was lawful.

So the way I look at that is, is there anything in their brief, any Supreme Court case, Sixth Circuit case, I mean, even go outside the Sixth Circuit, find something else, in this circumstance, and the answer is no. So for that reason, even if the Court needs to address qualified immunity, there is -- certainly qualified immunity would justify dismissal here.

THE COURT: Thank you.

Peggy, anything?

MS. FECHTEL: No. Thank you.

Mr. Hartt.

MR. HARTT: Your Honor, at the very end of Count 2, we have paragraph 241. Out of 272 paragraphs in a 74-page complaint, there is one single paragraph of seven lines of type which besides the Bivens action, which is the heart perhaps of Count 2, also requests an injunction, either injunction or declaratory judgment against the United States. That one little paragraph creates some very big problems.

The general rule, as we all know, under the Anti-Injunction Act and the Declaratory Judgment Act which operates in tandem with what we sometimes call the AIA, neither the assessment nor the collection of taxes nor administrative steps upon which they depend are to be enjoined.

Now, first, we need to be clear that of the ten plaintiffs in this case, there are really only two who potentially fall within the relief they're seeking here. And the reason for that is that six of the ten have had their applications granted. Two of the ten withdrew their applications and are no longer subject to being request -- having requests for information. That leaves us with two plaintiffs that still have pending applications.

THE COURT: Do you by any chance know the specifics, know which ones are --

MR. HARTT: I do, Your Honor.

THE COURT: Okay.

MR. HARTT: It's the Texas Patriots Tea Party.

THE COURT: Is which one?

MR. HARTT: Is one of the two.

THE COURT: Okay.

MR. HARTT: And the other is Americans Against Oppressive Laws, sometimes referred to as AAOL.

THE COURT: Okay. And who -- which ones withdrew, do you know?

MR. HARTT: Prescott Tea Party -- I can look that up and provide it to the Court, Your Honor.

THE COURT: Okay. I'm just keeping tab here.

MR. HARTT: Sure.

THE COURT: Anybody else know?

MR. HARTT: We'll provide that.

THE COURT: That's fine.

MR. HARTT: Of the two plaintiffs that still have pending applications, we also want to know that they received the opportunity to participate in the fast-track approval process the Service initiated in summer of last year. Essentially that said if you'll swear that no more than 40 percent of your activity -- these are (c)(4) applications, Your Honor -- if no more than 40 percent of your activity is political, you're essentially -- you're going to get your approval by, if not return mail, within a matter of a couple of days. Both of these plaintiffs declined to participate in that

process.

We turn then to the standard for enjoining the collection or assessment of taxes. The first of two important cases there is Enochs versus Williams Packing. It sets up a two-prong test. A plaintiff must establish an irreparable injury and that there is no way for the government to prevail in its action. It is mandatory that any party trying to enjoin tax collection establish both of those points. Some years after that, the Supreme -- that is a Supreme Court case, of course. Some years after that --

THE COURT: What case was that again?

MR. HARTT: Enochs versus Williams Packing. It's cited extensively in our briefing. I think they have comments on it as well, Your Honor.

THE COURT: Okay.

MR. HARTT: Some years after that, the Supreme Court came back and looked at that issue in the specific context of attacking the revocation of (c)(3) status and found that a case should be dismissed. That case was, of course, Bob Jones University versus Simon. The Supreme Court pointed out in that decision that the taxpayer there had the opportunity to either pursue litigation of that issue in the tax court, which, of course, is a prepayment forum, or to pay the tax and then file a refund suit and litigate it either in the District Court or in the Court of Federal Claims.

After Bob Jones came down, Congress went back and amended the Internal Revenue Code to add Section 7428. And that is a remedy only for (c)(3) organizations. And it says you file your application and the Service hasn't acted upon it within 270 days, then you can go to court and litigate it. Congress did not provide that kind of relief to (c)(4)s, and there is a reason, because a (c)(3) organization essentially has to get approval from the IRS before it can begin its operation. A (c)(4) organization, however, which is the bulk of the plaintiffs in this case, can simply self-declare and start operating. For all we know, the two people who withdrew may be self-declaring and operating this day. We're not to that point yet. They had that option.

The plaintiffs attempt to distinguish Bob Jones because they say it actually involved the assessment or collection of taxes, but they're wrong. It involved a ruling on the tax-exempt status of an organization which is ultimately what this case comes down to. The Sixth Circuit follows Bob Jones and it's an application of the Anti-Injunction Act. That case is the RYO, as in roll your own, RYO Machine versus Department of Treasury decision in our brief, two years ago, August of 2012. In that case, this Circuit said: "Regardless of how the claim is labeled, the effect of an injunction here is to interfere with the assessment or collection of tax." It's on page 471 of the opinion. The Court then continued:

"The Supreme Court has found that the AIA" -- Anti-Injunction Act -- "applied where nonprofit organizations complained about a change in their tax-exempt status." That, of course, is Bob Jones.

Now, then, I come to Cohen and Z Street, the two cases they mentioned under the Privacy Act. Both these cases have highly unique facts. The Cohen case decided in 2011 by the D.C. Circuit involved a situation involving a telephone excise tax. It was agreed by all parties that the people who had paid that tax had overpaid it and were entitled to have it refunded. The issue in Cohen was the process of the procedure for making the refunds. They then generate, of course, quite a bit of litigation. Obviously, that is not the situation in this case.

Now, just this year, we have the Z Street case. That also involved some peculiar facts. Z Street began as a case under Section 7428, which I talked about a minute ago, because Z Street was seeking a (c)(3) status, not (c)(4). Well, the case was filed in Philadelphia in District Court. The District Judge in Philadelphia decided when he looked at the case this is actually a 7428 action, which is important because for District Courts, the statute provides that those cases may only be brought in the District of Columbia. So the Philadelphia Court sent it to District of Columbia. There a new judge picked up the case, looked at it, and said, no, it's not a 7428 case, but she kept it, went on to decide it, calling it a

process case. Once again -- and relied very heavily on what that Court understood its Circuit, the D.C. Circuit, had in its controlling authority in the Cohen case.

Now, first, we go back to the point that only two plaintiffs in this case arguably even come within what these two cases have to say. But even as to those two, we respectfully disagree with what the Court in Z Street had to say. And we note for the Court that case is still in litigation and so we don't know what the final outcome of its decision will be. In any event, both Cohen and Z Street have highly unusual facts. We think this Court would want to hesitate before embracing those out-of-Circuit decisions, particularly since this Circuit in the RYO Machine case, one year after Cohen, took the traditional view of the Anti-Injunction Act and the Declaratory Judgment Act and went nowhere nearly as far as the two cases that we've been talking about did.

Here's the next thing: When you start looking at their response, it becomes clear that what they're really seeking at this stage is a pre-enforcement injunction prohibiting the Internal Revenue Service from ever auditing them in the future. No other exempt organizations receive that kind of special treatment.

Now, to a certain extent, we all know that in a response filed in response to a motion to dismiss, plaintiffs

are entitled to a certain amount of latitude to flesh out what they alleged in their complaint. Here, however, this metamorphosis we're seeing goes far beyond anything that really can be found in the complaint. They start talking in the response darkly about discriminatory audits and other abuses. If you go to page 29, they start making those kinds of statements. They actually list ten paragraphs in their complaint in support of that inflammatory statement. And it sounds pretty serious until, until you go back and read the ten paragraphs they cite on page 29. Because when you do, you'll become clear that you can search this record in vain for a single allegation of a single audit for a single tax year for a single plaintiff in this case.

But there's more. They suggest the IRS could show up sometime on their doorsteps and demand money to pay taxes and it would be a death penalty or some more elaborate rhetoric. What that kind of rhetoric reveals is either a fundamental misunderstanding of how tax administration operates or a deliberate mischaracterization of it because it is elementary that if the IRS begins an audit, it contacts the taxpayer. As the audit goes forward, the taxpayer may be requested for information. There's a series of interactions between the taxpayer and the examiner. Ultimately, there is a conclusion. If the taxpayer is not satisfied with the examiner's conclusion, it then has the first option to go through an

internal procedure within the IRS called the appellate process, have somebody take a fresh look at it. If at the end of the appellate process the taxpayer is still not satisfied, then before it pays a dime, it can file a petition in the tax court and have that Court make a decision. And if it's still not satisfied, then it can go to the appropriate Court of Appeals and litigate it there. Again, before any money is ever paid.

Once again, the elaborate rhetoric we see in the response is not enough for the plaintiffs to stay in court.

THE COURT: Any questions, Peggy?

MS. FECHTEL: Your argument seems to be all -- "procedural" is the wrong word, but focused on whether they can bring a claim because of the DJA and the AIA. If the Court finds that those are not procedural blocks to the claim, are you making an argument at all that the claims still fail under 12(b)(6)? Are you objecting that there is no cause of action stated against the government defendants or do you concede that there is a claim against the government defendants if in fact they can get around the DJA and the AIA?

MR. HARTT: Theoretically there is a claim. I don't think it's a viable claim. But I think the important point is when we start looking at the -- it's actually a fairly extensive body of law under the AIA and the DJA, the Courts have been very, very strong that you do not go around enjoining the collection of taxes, and the necessary procedural steps,

administrative steps, must be done before taxes can be assessed and collected. And indeed this Circuit two years ago, a little less than two years ago actually, in the RYO Machine case embraced that very strong view, and we think that this Court would want to look very carefully at that case and adhere to it.

MS. FECHTEL: Thank you.

MR. SERGI: Your Honor, I have that information you needed.

THE COURT: Thanks, Mr. Sergi. Okay. Hang on. Let me find my score sheet here. Okay.

MR. SERGI: NorCal Tea Party Patriots was granted in 2010. Faith and Freedom Coalition was granted in 2012. Simi Valley Moorpark Tea Party was granted in November of 2012.

I guess that's -- I've been skipping the months. The months aren't important.

The Tampa 9-12 Project was granted in 2011. The South Dakota Citizens for Liberty, Inc. was granted in 2012. The Texas Patriots Tea Party, I believe Mr. Hartt mentioned, was still pending.

THE COURT: Right.

MR. SERGI: The Americans Against Oppressive Laws, Inc. is also still pending. The San Angelo Tea Party was withdrawn, and that's from complaint paragraph 198.

THE COURT: Okay.

MR. SERGI: The Prescott Tea Party was withdrawn from complaint 2 -- paragraph 200. And this is from my memory, I don't have the date, but I -- the Texas Public Policy Foundation, I couldn't actually find it in our briefs, but I know we have a footnote saying that -- questioning why they were in the class because they were approved so long ago and it was their only claim. So they were approved as well.

MR. HARTT: The Texas Tea Party Patriot -- or Texas Public Policy Foundation I think is the last one.

THE COURT: Right.

MR. HARTT: And it was approved actually back in the year 1989 during the administration of the first President Bush.

THE COURT: Okay. Thank you.

MR. HARTT: Thank you, Your Honor.

THE COURT: Do you want to take a break first or would you like to argue first?

MR. GREIM: Well, actually I've got some things I need to organize and bring up there, so we may as well, so you don't have to stand there and watch me anyway.

THE COURT: Let's take a break until -- how long do you want?

MR. GREIM: Five minutes.

THE COURT: Well, let's take a break until 11:30.

(Recess in proceedings from 11:20 a.m. to 11:35 a.m.)

AFTER RECESS

THE COURT: All right. You may proceed, Mr. Greim.

MR. GREIM: Your Honor, although all three of these go to the First Amendment, really I think the first two arguments of the Bivens defendants kind of fit together, and I'll just -- I think I'll address those together.

THE COURT: Okay.

MR. GREIM: And at the very end, I'll get to the Declaratory Judgment Act.

You know, I heard an interesting thing from Mr. Bergeron up here. I think he said something like we want -- we want the IRS, we want these agents to be a little suspicious when people send in their 1023s and 1024s to get tax-exempt status. And that's right; they should be a little suspicious. But plaintiffs' view is that they should do that for everybody. They should not be suspicious just for people that are in the Tea Party movement and pull those out and, you know, be suspicious for 13 months, send the additional requests, and that's really the heart of the First Amendment claim here.

THE COURT: So an overzealous IRS agent. Are you saying that applies to all overzealous IRS agents?

MR. GREIM: Well, actually, it might be different in different cases, you know, and I'll get to this later. The King versus Zamaria case from the Sixth Circuit is pretty

important. It's critical for looking at people in a multilevel organization and deciding how do you assign liability to people, you know. From civil litigation, we have respondeat superior and various doctrines like that. Well, we don't have that with Bivens claims. And so one question will be what is the sort of mens rea, so to speak, that the individual agents have to have, the people that push the papers but did other things as well, and so what had to be in their mind; what did they have to know to be held individually liable. And that's different than people who actually set the policy. But the doctrine in this area does not say that only one set of people as presumed liable. They each can play a role in the scheme. And I'll get to that in a second. I think that's a qualified immunity issue.

The first issue is really Bivens and whether there is a scheme. Although I'm detecting I can do the qualified immunity first, if you --

THE COURT: No, no, no. I'm just thinking about a local overzealous IRS agent by the name of Rick Currin.

MR. GREIM: Uh-oh.

THE COURT: Go ahead.

MR. GREIM: Your Honor, starting with Bivens, I think really the same bundle of issues apply here in declaratory judgment in a way, and it requires understanding the process and it requires reading carefully what these remedial statutes

actually say and what they actually apply to.

The Fishburn case has been discussed a lot, and we did address Fishburn and several other cases in our response brief. But the important thing is those are at a different part in the process. Those are -- those cases arise after a taxpayer has filed returns, after they've either received a notice of deficiency so that -- and then they would appeal that to the tax court and you go on through the process of collection and maybe refund, or they apply to different parts of the scheme.

We prepared a sort of a visual aid that we tried out here.

THE COURT: Do you have a copy of this for the record?

MR. GREIM: Your Honor, I do. I have a couple of copies and I'll -- I can get them now or I can wait.

THE COURT: I just want to make sure that, yes, if you'd give it to Mr. Miller, anything you're going to put up on the screen, so we've got a record of what's up on the screen.

MR. GREIM: Actually, while we're at it, I have a few other copies. May as well just --

(Mr. Greim handed out copies.)

THE COURT: Law students, when you get to the part of the transcript and they say, "Look up on the screen," you know, "I want to show you what we've got on the screen here," and they've got a PowerPoint or something, there's nothing in the record. So, you know, when you're the lawyer, you want to make

sure that the court reporter has and the Court has what they need to be able to review the argument.

MR. GREIM: This is entitled No Remedial Scheme Exists for Plaintiffs' Claims. And what we have, Your Honor, is over on the left-hand side, this is all the conduct and procedure at issue in the litigation. Now, you'll recognize some of the statutes that have appeared in the briefs over on the right-hand side, and those apply at different stages in the process.

So the first column you'll see right here (indicating) is Audit and Assessment. And, you know, oftentimes the assessment is simply the IRS receives your returns. Somewhere they actually note down what your tax liability is, and most people just pay it. But the IRS may have other sources of information at that stage. They may actually audit you, and so they may get other information and decide that you owe a little bit more than that and so they'll issue a notice of deficiency. And you'll see that right here. That's under 6212. If you receive a notice of deficiency under 6213, you can then go appeal that to the tax court.

Now, you have other options. One thing you can do is you can pay your tax, and then you'll see over here you can apply for a refund and you won't get it, and so then you can bring a suit under Section 7422. But the question in all of these cases or at least in those cases is how much money do you

owe? What is your tax liability?

Now, aside from that question, let's say your tax liability is determined and you're just not paying it; you don't have the money. Eventually, the IRS can levy on your property and they can show up at your house with a sticker -- I think it might be the facts of Fishburn, actually -- show up at your house with a sticker and they can put it on your vehicle, and then the sheriff will come and take your vehicle away and they'll sell it and they'll try to recover what you owe. But a lot of times that can go wrong. The overzealous IRS agents can wrongfully levy and try to collect from you. And so we have a remedy, Section 7433, for improper collection activities. It's limited to collection activities. And that's what we have in the Fishburn case, for example.

A few cases have suggested that if there is an improper audit, which I recognize that in a list of things in our complaint we mentioned discriminatory audits, that's, frankly, not part of our case. We have no factual allegations about that. No one's reached that stage. But let's say that there was an improper audit request. There have been a few cases, and that's the Second Circuit case, which suggests that you can make them issue you a summons. You can then not comply with the summons. And then when they -- if they try to get you in federal court, you can defend with whatever defenses you were going to have to their improper request for information.

But anyway, that's that side of the ledger.

Now, there's one statute that comes kind of close here. You'll see statute Section 7428. You've heard that a few times already today. That is a statute that was enacted because of the Bob Jones case. In Bob Jones, that university had actually received a letter saying that you are qualified for (c)(3). It's like in the 1940s. Then in 1972, the IRS said we're no longer going to say that institutions that racially segregate people, that won't take blacks, are really, you know, have -- are charitable. That's not a charitable purpose, and so we're going to revoke that letter. So there was a revocation of the letter. It then took a long time to litigate that. And Bob Jones said, you know, it's not enough to be able to litigate your wrongful revocation of our tax-exempt status, and so 7428 was enacted to give somebody a chance to go in and get a declaratory judgment on that.

Now, it does also apply for (c)(3) applicants after you apply for exempt status under 501(c)(3). So if you're actually over in this category but you're just a (c)(3), after you've reasonably responded -- you've responded to all reasonable requests for information, so they've got everything they need, and they still wait 270 days, you can then bring an action for a declaratory judgment. So that only applies to (c)(3)s. It doesn't apply to most of the plaintiffs at all in this case. So this is sort of the statutory background.

Some of the cases that we've looked at, especially Fishburn, say things like, well, the Internal Revenue Code, which is massive, it is a comprehensive remedial scheme. Well, the problem is it's -- it's a framing issue. It's comprehensive once we're over here, but if you never get to this spot, if you're stuck in this little circle over here where you're applying, getting these threats and targeting and you sit here for several years (indicating), I mean, you're never going to have a chance over here to take advantage of those remedies.

So, you know, let's talk about the Bivens cases, the three that are cited the most, the Bush case, the Schweiker case, and the Wilkie case. Those cases actually demonstrate why Bivens ought to apply here.

Bush versus Lucas was a case where a Civil Service employee was wrongfully demoted and so -- or they're either demoted or they were filed. Well, under the Civil Service Reform Act, there was an actual process for challenging that, getting reinstated, getting your back pay, getting your seniority status back. And that's actually what the plaintiff did there. In that case, in fact, the Court said, you know, your constitutional deprivation is the same thing as your statutory deprivation. So in effect, the plaintiff was saying, well, you violated the statute and you've done that, you know, not only with the statutory bad act but it's also kind of

unconstitutional at the same time; so therefore, I should also get all the things I just mentioned but also emotional distress damages and attorneys' fees. And the Court said no; we have a comprehensive remedial scheme, you took advantage of it. You got your back pay. You got all the things you needed. So therefore, we don't, you know, we have a comprehensive scheme.

Schweiker is a similar sort of case. There the issue was entitlement to disability benefits, and in those cases, you know, there was an avenue to actually litigate whether their disability benefits were wrongfully terminated. They would then go through the process and they would have them restored. The plaintiff in that case had them restored. And it would even get the value of the benefits they weren't receiving back during the gap. And again, the plaintiffs said, well, what about the burden of not having them during that period. And, you know, that particular category of their damages just couldn't be recovered because, again, Congress set up a comprehensive remedial scheme.

Well, in this case there is no comprehensive remedial scheme when you're over on this side. There's nothing there. There's some little -- people playing a little fast and loose with the complaint when they suggest that defendants simply want a little more. They want a little more relief. There's -- they're not getting quite enough relief or perhaps they don't want to fight with their arm tied behind their back.

Well, they're not even in the arena to fight when they're over on the left-hand side. So there is no remedy.

Now, it's very true that simply not having all the remedies you want, again, doesn't mean you've got to go Bivens. But when there's not even any statutory scheme set up for you and there's no remedy whatsoever, then we're right back into the Bivens area.

Now, this argument is more or less developed in the briefs, but I wanted to make sure that our argument was clear that we're not just claiming we need or want an additional category of damages. But, you know, there's kind of a second argument that I've got to address and it's that, well, Congress, when they enacted especially Section 7433, they thought about this entire problem and they decided we don't want to allow Bivens lawsuits for all the targeting and delays and other things that could happen before anyone ever hits, enters into this system. But that's not correct, and there is a back and forth about the legislative history in the briefs. I think it's really important to read that history. Both sides dispute what it really means. At the risk of --

THE COURT: Would you identify for the record what you're putting on there?

MR. GREIM: Sure. Your Honor, I'm putting on page 243 of the section of the legislative history we've cited in our brief. I wish I had the full cite to read here, but it's

actually -- a part of this, the cite actually is in our response brief.

But this is the testimony of Mr. Gibbs who was the IRS Commissioner at this time. And Mr. Gibbs is commenting on a proposal at that time that you can see right here under A. The Act would have allowed employees to be held personally liable for the deprivation of any rights, privileges, or immunities secured by the Constitution. Well, that could be our claim here. I mean, that's essentially a Bivens claim. So they would have taken Bivens and they would have basically enacted it in statute for IRS agents.

Now, the other thing that this would do is it would get rid of official immunity because now we just have a statute for these agents. But here's what the Commissioner said. He said: "A right of action against Service employees currently exists. The Supreme Court recognized a cause of action directly under the Constitution in Bivens. Bivens suits are an available remedy for those whose constitutional rights have been violated by federal employees acting under the color of federal law. In fact, more than a thousand Bivens suits were filed against Service employees during fiscal years 1980 through 1986." Then he says: "It should be noted, however, that none of these suits has ultimately been successful."

And, of course, one reason for that is the second thing I'm going to get to in a moment which is the issue of

official immunity. But this is important because Congress saw this, and when they enacted 7433, did they decide that, you know, we're not going to allow any other remedies; that this will be the exclusive remedy for deprivations of constitutional rights by IRS agents? No, they didn't. They did say it would be the exclusive remedy for collection, for issues involving collection. But that's not this case. So Congress was aware of Bivens. Congress had it in its power, it knew how to limit the reach of these statutes, it knew how to limit the causes of action that would be available, and it decided not to reach out and take away what was over here on this side of the ledger.

Now, frankly, when you go through the history, you don't see discussion of issues with people who are just applying for tax-exempt status. People would have been aware -- I mean, the Bob Jones case came later, but, again, that's on the other side of the red line. Bob Jones had its letter revoked. So, again, it's a different kind of case. And then they enacted a statute on that issue.

So, you know, it's true there is no case out there that we've been able to find and there's a couple suggestions in dicta from the Ninth and Tenth Circuits and cases that are cited within the authority the parties have cited, but there's no case out there that says people in the same position as plaintiffs are entitled to a Bivens remedy. I mean, that -- if that case were there, it would have been the very first case we

cited in our brief. But it doesn't -- that doesn't mean we can't cover this area, especially when there's no adequate remedial scheme whatsoever.

In fact, let's talk for a moment about the Wilkie case because the Wilkie case answers sort of the second set of issues that especially Mr. Bergeron highlighted.

Now, Wilkie sort of made clear that we have a two-step process under Bivens. The first step looks at whether we have an adequate remedial scheme, whether we have actually a comprehensive remedial scheme, and that's everything we've just talked about to this point; and that's Fishburn and all these other cases.

The second part of Wilkie, though, was, all right, well, let's say that we don't have an adequate remedial scheme. Let's move to the second part of this test and let's decide whether special factors would counsel against expanding Bivens liability. That's an important part of Wilkie, and I think it goes to this concern that we've heard the management -- or the lower-level defendants raise about, gosh, are we going to really make all the poor IRS agents sitting at their office in Cincinnati liable just because they send out a letter or something, you know, and how are we going to -- how are we going to police that.

Well, the Wilkie case was a little different scenario. There it was a rancher. He was in this issue with the Federal

Government, Bureau of Land Management, and they couldn't -- they wanted him to grant an easement over his property. He didn't want to do it. And so the Land Management worker started doing all kinds of things to him. Some of it was tortious. But, of course, he had a remedy, a state tort remedy, so there's no Bivens issue there. And then there were all kinds of administrative proceedings he could have raised and used to challenge different things that the Bureau of Land Management was doing to him, and he used some of them, he didn't use others. What the Court adopted, I think it was Professor Tribe's argument there, that this is death by a thousand cuts. And so, yeah, you know, there's no remedy for death by a thousand cuts, but, you know, which cut is the last cut; is it the five hundredth cut, is it the four hundredth cut. And the problem that the Wilkie case identified and the reason it didn't extend Bivens liability was that what the government was trying to do was not -- it was basically to negotiate with him as a fellow landowner. It was trying to get him to agree for some, you know, I think it was at issue how much compensation but to somehow grant them an easement. And it said, we don't -- that's not a cause of action by itself, and so it has to depend on the degree of effort; we're not going to do it.

But here's what Wilkie said, it said, you know, there's another kind of case close to this where we can draw

clear lines. It said a First Amendment retaliation case. Retaliation cases are all over. You know, we cite them all the time. There's several, by the way, Sixth Circuit retaliation cases involving prisoners that we've cited in this case. But there are tests there; there's a three-part test that we can administer, and we can figure out whether somebody has the requisite intent to retaliate against you for violating your First Amendment rights. Now, that part of Wilkie is dicta. That wasn't necessary to the holding. But it does explain how you can have a clear, you know, test that could apply to the retaliation context.

And that's why we have all these Sixth Circuit decisions that actually deal with retaliation against prisoners and they applied Bivens. We're just applying it against instead of prison officials who sent somebody to a bad jail or something because they're helping people file grievances, we're going to apply it to IRS agents in this case.

Now, let's talk a little bit now, shifting from Bivens over to qualified immunity, what has to be shown for the individuals.

Well, the King versus Zamaria case is important because what that case establishes is that not every single person within the IRS had to within their own mind conceive of the plan, have this animus against the Tea Party groups who were being targeted, and then be the sort of sufficient cause

of the targeting occurring. That can happen at different levels. Now, it's not as extreme as saying as long as the subordinate of yours did it, you're liable. That's not the law. But if you put in motion the scheme with retaliatory animus and the reasonably foreseeable result is that that scheme is actually going to occur, you're liable even if you weren't the one that actually sent the letters out.

THE COURT: So Mr. Bergeron's example of people just processing paper, you're saying once the scheme is put into effect, they're liable no matter what?

MR. GREIM: No. No. In fact, that's the second part. So that what I just mentioned relates to supervisors. Now let's move down to the lower-level people because that cannot be the law. It cannot be the law.

The lower-level people who actually get the list, okay, these are the people that have been, you know, that are before you; you're specialists, you've been given, you know, Tea Party groups 1 through 15. Carter Hull says these are the questions that you need to ask, so send out your -- get your letters out to these people and ask them about who their donors are, ask them all these other things; that there's two parts there. Okay. First of all, we would say, we would argue, and I think it's got to be correct, that a reasonably -- a reasonable IRS agent would know that for purposes of determining someone's (c)(4) status, you don't ask for all

their donors. I mean, you can't -- those aren't publicly disclosed on people's actual returns once they get status. You can't ask them to disclose those and put them in the public file because, remember, all this is public, what people send into the IRS. The identities of their donors have nothing to do with whether they have a social welfare purpose.

But we don't even have to debate over that issue right now because the IRS already admitted, and we've alleged this in our complaint, that there are about seven questions that had no tax administration purpose.

THE COURT: Let me go back to you said everything is private that you send to IRS -- I mean, I'm sorry, public?

MR. GREIM: With the return information, yeah, but when you send in an application to the IRS, so your 1023 or 1024, if you were to disclose all your donors, then that's public. The applications are public. And I don't have a cite on that but I bet Mr. Hartt or Mr. Sergi does. But anyway, that's public. But even if it wasn't public, the issue is it wasn't necessary for tax administration. The IRS already admitted that, and you can get that right from the TIGTA report. And, again, at the motion to dismiss stage especially, we have to -- that's a factual issue that we have to give plaintiffs the benefit of the doubt, but we actually have the admission already in there.

Anyway, that's one thing. That's knowledge now that

the individual agent has.

The next thing the agent knows is that we have gone in and we have tried to target not just -- we didn't just run some search terms that sound political. We went after the, quote, Tea Party movement. And they actually used other ideas and phrases that would get people who didn't say "Tea Party" but who were allied with them. And so the agents working on these cases are aware of that.

Now, it's a very important distinction. I would guess when we depose these people, that many of them would say I have nothing against the Tea Party. I don't subscribe to their ideology, but everybody's got their right to speak. I have no issue with them whatsoever. But, Your Honor, that goes to the issue of malice. Malice is not required for First Amendment retaliation. What's required is an adverse action against somebody, you know, as a result of their First Amendment -- well, first of all, that plaintiffs engaged in protected conduct. Second is that the defendant took an adverse action to deter somebody from engaging in that conduct. And third is that the adverse action was motivated, at least in part, by the protected conduct. And that might mean that simply because you know they're engaging in this conduct or that they have these beliefs, you decide to go after them.

Now, you might think you've got other reasons. You might say, well, people that have those beliefs seem like

they're likely to get involved in candidate races. It seems like a lot of these Tea Party groups, you know, because of what they believe about government, they're likely to also, you know, not agree with the tax laws and violate them. But that's not permissible, Your Honor, because what you're doing is you are targeting someone because of their political belief. It doesn't have to be you're targeting them and you disagree with their political belief or that you have malice against them or you have malice against their Tea Party. And so that's an important point of causation here. That -- I know we didn't get into it in the opening remarks, but it's important to understand how it is that people with sort of different mental states and different roles in the procedure from the top to the bottom could all be found liable under a Bivens theory. And, again, you only need to look at the Sixth Circuit cases about, you know, the different levels of prison officials, from the guys working right with the inmates to the ladies who supervise them to the warden, going through people who were transferred because they were filing grievances or getting other, you know, inmates to do it, you know, what was the requisite mental state, what do they have to know. And so that's why that case is significant. And we think, as we've argued in the briefs, it supports finding a violation against some of these individuals.

And, by the way, you know, I think the statement was

made that there's been no showing that anyone, any of the line-level employees had any kind of malice or, you know, had any kind of intent to retaliate, but we pled it in our complaint that one of them, Stephen Seok, said, you know, the Tea Party, these groups are different from regular social welfare groups who want to help the poor because they want to limit the scope of government. And, you know, you can say that without any malice, but that is an unconstitutional motivation because it's directly tied to their viewpoint. It's even worse than content-based discrimination.

So, Your Honor, I think I won't go through all the different allegations here, but we've laid out in our briefs for each individual person that's in our response brief what the acts were and where they fit into the scheme.

One thing I want to point out, it was touched upon, I think, by Mr. Bergeron, the Bray case which is relatively recent from the Sixth Circuit. That was cited in their reply brief for the proposition that you -- to get around qualified immunity, you have to point to a prior case with identical facts, with the identical legal holding, and that is not correct. That is not the law. The law -- in some cases the law requires more specificity. And the only line of cases I've been able to find that's like that is the excessive force cases where officers are reacting in the spur of the moment to stop somebody from doing something. There the Court requires a

little more specificity about what other conduct and restraints against somebody who's acting out is okay.

But otherwise, the background rule as we've cited, the Hope versus Pelzer case, it says that even in novel factual situations, that the agents can have notice that a reasonable agent could know that the violation is unconstitutional. And, again, there's no question that retaliation against someone for a violation of your First Amendment rights, that is definitely clearly established by law and has been for a very long time. The only question is whether an IRS agent in this position would know that, hey, pulling out everybody who believes like the Tea Party and then holding them for 13 months or two years and asking them all these questions, is there something that's wrong with that. And we've alleged other facts in the petition about why people did know that was wrong, circumstantial evidence that people tried to cover things up, that they tried to say let's not say we're doing it for political -- for the political reasons; let's come up with other reasons for doing it. We've alleged circumstantial evidence there that would support that.

So with that, Your Honor, let me move on to the Declaratory Judgment Act.

Trying to keep an eye on the time here.

THE COURT: No, no, that's all right.

Oh, Peggy, I'm sorry.

MS. FECHTEL: Can I ask two questions on that before you move on?

You had cited to a King case in the beginning I think regarding levels of liability. Can you give a cite to that case?

MR. GREIM: Yes. It's 680 F.3d 686, 2012, from the Sixth Circuit. And the full citation is in our response brief.

MS. FECHTEL: And secondly, on the clearly established, I think that's the last thing you were addressing.

MR. GREIM: Yes.

MS. FECHTEL: Would you summarize again why you're saying they knew this was clearly established? Have you conceded that there is no case on point so you're saying it's other circumstantial evidence?

MR. GREIM: Well, I would concede that there is no case involving IRS officials, you know, targeting people who are just applicants for tax-exempt status.

What I would say is you look at the right that is clearly established which is the right to be free of retaliation for exercising your First Amendment rights. It's established in many different contexts. And then I would say that a reasonable IRS agent, and I would extend that to -- I would extend it to other agencies as well, for people who deal with sensitive information, deal with political activity, would know that, you know, there's nothing wrong with following up

with a request from one of the entities about the candidate forum they had, but it is wrong to only go after Tea Party groups and people that have the same ideology, to target that group, pull them out for two years, do nothing with them for 13 months, and then to ask a whole bunch of other questions for each one of them.

And so it's, you know, under Bivens, the law can't actually develop if you require that specific factual scenario over and over again.

MS. FECHTEL: Thank you.

And just to clarify, you said several times it's clearly established no retaliation for First Amendment rights. Do you still have a Fifth Amendment claim?

MR. GREIM: Well, we have a Fifth Amendment equal protection claim. We're not -- we had raised a Fifth Amendment due process claim, and we are not defending that. We didn't defend that in our response brief, as I think a few people noted in their reply. The equal protection claim rises or falls with our First Amendment viewpoint discrimination claim which is technically distinct from the retaliation claim. And we cited some authorities about why they rise and fall together in our response brief.

MS. FECHTEL: Thank you.

MR. GREIM: Your Honor, I now have a few comments on the Declaratory Judgment Act and Anti-Injunction Act.

Interestingly, in that discussion, we didn't talk about the key phrase from 26 U.S.C. 7421, the Anti-Injunction Act, which is that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court by any person. Now, the case law interprets the DJA which is 28 U.S.C. 2201 to be co-extensive with the AIA, and so the question then in applying these two statutes is is the lawsuit for the purpose of restraining the assessment or collection of any tax.

Now, of course, the IRS wants to argue that that is the purpose of almost any lawsuit involving taxation. And that is what led to the Cohen decision, although Mr. Hartt is quite correct that the Cohen decision -- maybe returning to our chart up here, if I could. The Cohen decision dealt with after collection. We're dealing with a special scheme for refunds. And so the government there said, well, okay, it doesn't actually deal with collection, it definitely doesn't deal with assessment, but it does deal with the amount of money that will be in the U.S. Treasury and so that's the real purpose. We really don't want -- we really don't want litigation against the IRS that gets in its business, so to speak, about how much money is going to be in the U.S. Treasury. And so it really extends beyond both ends. And the D.C. Circuit said absolutely not; that is not what the statute says. And it said the IRS envisions a world in which no challenge to its actions is ever

outside the closed loop of its taxing authority. It argues assessment and collection are part of the single mechanism that ultimately determines the amount of revenue the Treasury retains.

Well, it rejected that argument squarely. And so Cohen is not limited to a specific program. It's an en banc decision from the D.C. Circuit Court, and it does not conflict at all with any decision from the Sixth Circuit. There's some suggestion from the government that somehow it is different -- that the RYO case and other Sixth Circuit decisions lean a different direction, but all these cases are ultimately construing what is the collection and the assessment of taxes.

Now, if we go back to the chart, the assessment and collection of taxes are over here after somebody has actually filed their return, and now the question is, at most, in some cases it could be are you a (c)(3) or are you a (c)(4). That's not even the question here. And this is what really did it for the Z Street Court which is still -- the case is still pending, but what did it for the Z Street Court is your claim, plaintiffs, (c)(3)s, is not that you through this lawsuit need to obtain your tax-exempt status, that's not what you're trying to get. This is not a declaratory judgment to say recognize me as a (c)(3). That's why it wasn't a 7428 case, by the way, because that's what a 7428 case would do. What the Z Street Court said is that, no, your claim is about everything over

here (indicating). It's that pro-Israel Jewish groups were targeted to pull them out of the process and hold them and ask them all these questions because what they're saying might conflict with, you know, U.S. foreign policy goals. That was the reason there. And, again, the foreign policy goals do not mean it's okay. It would still be a viewpoint discrimination even if they had some other reason. So the Z Street case is directly on point and, you know, basically just construing the plain language of the Anti-Injunction Act.

Beyond that, the government makes some other arguments about the Bob Jones case. There, the Anti-Injunction Act applied. But, again, we are over here. They already received a letter and it was revoked. And anyway, we've gone around that with 7428 now. Congress passed a law.

And then finally, the government says this is actually about much more than the targeting process in the pre-application stage. And it cites, I think, one point in our complaint in the very beginning we mentioned discriminatory audits. Well, none of the facts in the complaint are about audits. This is not an audit case. There's -- we're not seeking any kind of relief about what the basis for an audit might or might not be because after all, these groups, as far as we know, have not been subjected to any audits. There's no audit in process. And so we're not seeking that kind of relief. We are seeking forward-looking relief, though, for the

plaintiffs who have not had their status granted, and so that's why the Declaratory Judgment Act and the Anti-Injunction Act cannot possibly apply here.

That's all I have. And I can answer any questions on that.

THE COURT: I have nothing. Thank you.

MR. GREIM: All right.

THE COURT: Any rebuttal?

MS. BENITEZ: Yes, Your Honor.

Your Honor, just a few quick points.

Plaintiffs' counsel says that the Sixth Circuit cases applying Bivens in First Amendment retaliation claims are the ones that they rely on because in those cases, they're just applying it instead to, you know, instead of to prisons, here they would be applying it to IRS agents. Well, that makes all the difference. The clearly established analysis is a context-specific analysis, and so the starting point here is what is the context.

Also, the principal case that they rely on, the Downie case, is one where the Sixth Circuit denied the extension of Bivens because of the comprehensiveness of the Privacy Act.

Plaintiffs also say that malice is not required, but if -- they are required to allege that there was a purposeful infringement of clearly established rights, which they have not alleged. They have not alleged that any of the individual

management defendants have personally and purposely infringed on the clearly established First Amendment rights of each of the plaintiffs.

Plaintiffs also say that it's a framing issue, but respectfully, I would say they're framing it the wrong way. You have to look at the entire Internal Revenue Code because it's what Congress considers in terms of what remedies to provide and what remedies not to provide. The Internal Revenue Code is the same Code that's in all of the cases dealing with Bivens remedies. I mean, they're every -- the Courts are referring to the Code as a whole.

Now, Courts have said that even if the plaintiffs have no remedy, a point that plaintiffs here seem to concede, that there's not a proper extension of Bivens. And in fact, in Bush v. Lucas, you know, despite the extensive remedial scheme that was available in that case, the Supreme Court said it assumed that, quote, Congress has provided a less than complete remedy for the wrong. And so the fact that plaintiffs do not have a complete remedy or a remedy at all is not a basis for finding that there should be an extension of Bivens.

THE COURT: What case was that again?

MS. BENITEZ: That's in Bush v. Lucas.

THE COURT: Okay. Thank you.

MS. BENITEZ: Plaintiffs here have conceded that there are no cases that say that plaintiffs in their position are

entitled to Bivens, but there are in fact cases in just about every Circuit considering declining to extend Bivens in not -- while not the same context, in the taxation context. And even looking at plaintiffs' chart, to the extent that assessments and audits are put in the same category, there certainly have been cases from the Second Circuit and the Fourth Circuit where the Courts have denied an extension of Bivens in the context of retaliatory tax audits.

Plaintiffs also rely on Wilkie. Wilkie did nothing to change the law in this area or the Bivens analysis. In fact, in Wilkie, there was a denial of the extension of Bivens. And to the extent the Court was talking about special factors counseling hesitation, those special factors have been found not just in Wilkie but in many cases to include the existence of a comprehensive remedial scheme having been enacted by Congress. So that's certainly a special factor.

Finally, I just wanted to make one other point on Wilkie, going back to the question that Your Honor asked, and that was the question of whether or not one gets to -- if you decide Bivens first, whether you get to qualified immunity. And looking back on the cases and conferring with my co-counsel, if one looks at the Wilkie case, footnote four, the Court says: We recognize just last term that the definition of an element of the asserted cause of action was directly implicated by the defense of qualified immunity and properly

before us on interlocutory appeal. Because the same reasoning applies to the recognition of the entire cause of action, the Court of Appeals had jurisdiction over this issue, as do we.

So, in fact, the Supreme Court, even though other appellate courts have treated Bivens and qualified immunity together and have meshed them, the Supreme Court has said that the question of Bivens is part of the qualified immunity analysis. So both are threshold issues and both would be immediately appealable. I just wanted to clarify that.

THE COURT: Peggy, anything?

MS. FECHTEL: No.

THE COURT: Thank you.

MS. BENITEZ: Thank you.

MR. BERGERON: Your Honor, just a few points in rebuttal.

THE COURT: Hang on one minute.

MR. BERGERON: Sure.

THE COURT: Okay.

MR. BERGERON: Your Honor, they've conceded that there's not any case out there in the Bivens context that has recognized the cause of action they're asking you to recognize. And when we say, hey, but there's all these IRS cases that have rejected Bivens, they say, well, you can ignore those, you can ignore those and look at cases that deal with prison issues? I mean, that makes no sense. You've got cases in the IRS context

refusing to recognize Bivens claims, and they don't have a response to that. And I think that's telling at the end of the day.

In fact, I'm not even sure what this cause of action is supposed to look like. He started out talking about the mens rea aspect, an element of the claim, and then said, well, maybe you can equate it to a retaliation claim. But at the end of the day, my clients, the individuals, the lower-level employees, how are they supposed to know that, oh, well, I -- if I do this, it crosses some threshold either for Bivens or qualified immunity because there's no guidance there. And when he says, well, you can look at retaliation, that's a good proxy; okay, well, look at the Second and Fourth Circuit that addressed these issues head on and reject a Bivens claim in those contexts.

And when he spoke recently about -- or briefly about the legislative history, both the Second and Fourth Circuit walked through exactly that legislative history and say what's clear is Congress considered a lot of different things, a lot of different causes of action, they didn't give everything that this particular plaintiff wanted, but that's okay. I mean, that's Congress's prerogative. And neither one of them came to the conclusion that they want you to draw in terms of the legislative history confirms that there is some Bivens cause of action. In fact, they squarely reject that. And, obviously,

they have no response to those cases. And I -- just to reiterate, both of those cases rely on the Sixth Circuit's Fishburn case, cited it favorably.

Back to my point, Your Honor, about not understanding what the burden is. I thought, you know, the only individual defendant that Mr. Greim mentioned was Mr. Seok. And the quote in the complaint is on page -- paragraph 72 and says: "Normal (c)(4) cases we must develop the concept of social welfare, such as community newspapers, the poor, et cetera. These Tea Party organizations mostly concentrate their activities on limiting government, limiting government role, or reducing government size. I think it's different from the other social welfare organizations which are (c)(4)." It's hard to quibble with that, Your Honor. They are different. They're not out there trying to help the poor or make a community newspaper run. Now, they may still be entitled to (c)(4) relief and that issue is not before you, but in terms of saying ah-ha, this shows First Amendment animus, all he's saying is they're a different category; and that if that's enough to trigger First Amendment Bivens liability, I submit again, consistent with my point earlier, that it's going to be difficult to find anyone to work for the IRS.

So the remedies that they have at their disposal, and I kind of like the chart that he put up because I have a hard time seeing how any lawyer with a modicum of creativity could

not make all of these claims fall on this side of the line. If you say, oh, geez, I've got -- I've had delay here, they made improper demands, you know what, you file your action in Federal District Court under 7428 and say I'm entitled to my determination and the IRS has not acted and I've waited the requisite amount of time, I want a ruling, Judge, and then a federal judge would rule on it. And the issue about threatening taxation, well, if they actually do tax, then you've got your remedies, the collection suit, or you try to get a refund. So this notion that they have no ability to invoke the administrative remedies they have here, I think is strange credulity.

But in any event, even if they're right on that, that gets back to what the Sixth Circuit has said in Krafsur and what the Second and the Fourth Circuit said in the retaliation cases which is you know what, Congress makes policy determinations; and if at the end of the day you don't get exactly what you want, that's Congress's determination.

So unless Your Honor has any further questions.

THE COURT: I don't, no.

MR. BERGERON: I respectfully request you dismiss. Thank you.

THE COURT: Thank you, Mr. Bergeron.

Mr. Hartt.

MR. HARTT: Several points, Your Honor.

First, just so we're all clear, Mr. Greim talked about the notice of deficiency. The notice of deficiency is not a document the IRS just shows up at your door and says here's your notice of deficiency, you owe tax. That comes after the audit process with the interaction with the taxpayer, after the opportunity to go to appeals. Then you get your notice of deficiency. But you don't have to pay then. You can go to the tax court and on to the Court of Appeals. I just want to be very clear about that.

Secondly, we had a discussion about the levy process. I'm not sure exactly where that fits into this case, but let's be clear about that. He acknowledged that there is a specific remedy called a wrongful levy remedy. If somebody thinks the IRS improperly took their property, they can invoke that. Moreover, we even have now collection due process procedures. We don't need to get into that. This is just not part of the case. But for what it's worth, that's where we are.

The next point is significant.

THE COURT: Wait. I'm just curious. What is collection due process? What is that?

MR. HARTT: It came in recently, I say "recently," within the last ten years or so, Your Honor, and it gives someone who is a subject to collection activity the opportunity for an internal procedure within the IRS. And, again, if they're not happy with the results of that process, then they

can go on to the tax court and say the lien you filed was wrong, the levy you filed should not have been made. It's very complex and it's way beyond anything that's involved in the case today.

THE COURT: Thank you.

MR. HARTT: Next point is important. That is, they appear now to have withdrawn or backpedaled on the language on page 29 of their response about the discriminatory audits. It appeared to us that where they were going with that was, again, to kind of metamorphose beyond what was said in the complaint, beyond what the Inspector General of the Treasury said, beyond what the taxpayer advocate said, beyond what everyone who's dealt with this issue has said, and that is that this issue has to do with the alleged improper targeting of certain groups who applied for tax-exempt process, period, full stop, end of story. And we're there on the same page. That's good.

Next, 7428. It's very clear that 7428 came into the law after Bob Jones versus Simon. Congress created a particular remedy for organizations under 501(c)(3). They did not include organizations pursuing status under 501(c)(4). Congress obviously knew how to add (c)(4)s in there if it wanted to. It did not. Why? Because as we pointed out to begin with, the (c)(4)s can simply self-declare. They can just start operating and say we're a (c)(4), file the return that becomes due saying we're a (c)(4). Then if the IRS wants to

come along and audit them and say, well, we think you are or we think you're not, okay, fine. Then you can go through the audit process and that long series of steps that I've already described twice now.

We get, then, to the AIA/DJA. They point out that the statutory language says assessment or collection. But we pointed out in our briefing, pointed out again this morning, that the Courts had uniformly said those two statutes work in tandem with each other and crucially for our analysis today, that they include administrative steps necessary to assess or collect a tax; i.e., the (c)(4) gets audited, the IRS says you owe tax, they say no, we don't; you go forward, you have your remedies, it gets resolved. So they've got a remedy without the necessity of 7428.

Cohen and Z Street, as we pointed out, both involve highly unique facts that are clearly different from the facts in this case. More importantly, I think, for the analysis today, the decision of the Sixth Circuit a year after Cohen adheres to this traditional approach to the AIA/DJA which is a very rigorous standard that says there's not going to be --

THE COURT: I'm sorry, what case are you quoting?

MR. HARTT: I beg your pardon. It's RYO, which I think is an acronym for roll your own cigarettes or whatever, RYO Machine versus the Department of the Treasury decided in August of 2012, and it's cited in our briefing.

THE COURT: Thank you.

MR. HARTT: That gets us down there to my last point, Your Honor, and that is, that by taking out the potential argument that we're talking about discriminatory audits, these other future evils, what we're down to really are just the two defendants that I mentioned. He had no response to that. So as to eight defendants, their injunction argument doesn't even apply. As to the two that potentially could come within it, the law from the Supreme Court, the law from the Circuit is very clear that the Anti-Injunction Act and the Declaratory Judgment Act soundly and clearly prohibit the relief they're seeking.

THE COURT: Anything else?

Mr. Greim?

MR. GREIM: Your Honor, I did have. I don't want to abuse this.

THE COURT: That's all right.

MR. GREIM: But there was a point made about (c)(4)s being able to self-declare. I think that's important. We recognized that in drafting the complaint, and the problem is once a (c)(4) has applied and they're sending things back and forth to the IRS, if they want to withdraw, they are now determined to be not a tax-exempt entity. So they lose that right once they're caught in the trap of having made their initial application without knowing what's going to happen to

them.

And the second point is that there's a whole reason for the letter program. It's that it's a valuable --

THE COURT: Reason for the?

MR. GREIM: For the letter program. That's the program where you can get a (c)(4) letter and not wait to see whether an audit happens at some point. When you get that (c)(4) letter, you know, okay, if I keep doing the things that I told them about to get the (c)(4) letter, I'm going to be okay. We can be pretty sure we're going to be a (c)(4). And that's why the IRS even has the program. People pay several hundred dollars just to participate. So it's not really an answer to say, well, just self-declare. I mean, the whole point of this is that there is a valuable government benefit that you can't in a discriminatory way take away from people that is the program.

THE COURT: Thank you.

Mr. Hartt.

MR. HARTT: Your Honor, somebody files an application. It's not dangling out there in the wind, I guess is the way he means to describe it. If they don't like it, they can do what two plaintiffs in this case did. They can withdraw their application. They can start operating. And they've now self-declared. They can proceed along the path that I have just described.

What Mr. Greim is really suggesting to the Court is that while there are remedies there, wouldn't it be better if they could have something like the (c)(3) remedy under 7428, wouldn't it be nice if they could compel through the Court the IRS to grant their application. Well, that doesn't go to whether there's a remedy at all. What he's saying is they'd just like a better remedy than they think they've got now. That, Your Honor, is a question for Congress to decide and not for the Courts.

THE COURT: Thank you.

Anything, Peggy?

MS. FECHTEL: No.

THE COURT: All right. Let's move on, then, to Count 3, the inspection of return information claim.

Let me just get it together.

Okay.

MR. HARTT: Count 3, Your Honor, was not in the original complaint. It was added when they began their amending of the complaint. And basically it seeks relief under Sections, I believe, 6103 and 7431. 6103 is the statute which defines "taxpayer information." 7431 is the part of the Code that kind of crystallizes how you go to court and act upon any abuse of 6103.

We ought to begin by noting that there are really two different types of activity under Count 3. One is the

disclosure of taxpayer information, and the second is the inspection of taxpayer information. This brings me back to one of these plaintiffs and that is this Texas Public Policy Foundation, the one that's been operating for 25 years now. Frankly, Your Honor, there's no reason for this plaintiff to be involved in this case. Obviously, there's no targeting of the application that's been the subject of our discussion today and recently the news media. This group has been functioning for a quarter of a century now. Their complaint was what looked like, we thought, described in the plaintiffs' complaint really a garden variety wrongful disclosure case. And it seemed to us that was basically a bilateral dispute between Texas Public Policy Foundation and the government which should have been litigated in a bilateral case back in Texas.

In any event, we challenged the allegations in the complaint as being deficient. We said you have no allegations as to how this information was purportedly released, no allegations about to whom it was released, and you don't allege anything about whether the IRS is the source of what you described as media reports. We were very up front with these deficiencies in our motion to dismiss. But when they filed their 80-page response, when it came time to respond to those challenges to what they said in their complaint, basically it was a case of answer came there none. They had nothing to say. We believe they have dropped the point and this should be

dismissed.

Now, for the sake of completeness, they may, unclear, may be trying to also argue that there was a wrongful disclosure of information within the IRS. Courts really have never been called upon to deal with this, but it theoretically could be an argument. The distinction being the disclosure law we're all familiar with involves a disclosure of information held by the IRS outside of the IRS. In any event, if there is some notion that's included in this complaint, then, once again, they've never provided anything approaching the level of specificity and detail required under Rule 8; and if that is an argument, then it should be dismissed also.

That gets me, then, to what really is, I think, the heart of Count 3, and that's their claims of wrongful inspection.

In 1998, Section 6103 was amended. The statute that amended it was entitled the Taxpayer Browsing Protection Act, and it was meant, as everyone who was associated with the passage of the legislation to President Clinton when he signed the legislation, to provide protection against a curious IRS agent browsing, looking at a return or return information that is a case not assigned to him or her. The examples that are typically given were some curious agent pulling up the return of a celebrity or public figure. The Taxpayer Browsing Act is meant to prevent that. Obviously, that has nothing whatever to

do with this case.

Agents who are assigned to a particular taxpayer obviously have the right, the duty really, to examine the return and the tax return information of that taxpayer. Accordingly, it seems to us that the rationale as there emerges, I guess, the response in the complaint, is that the IRS has asked for too much information, it took too long to ask these questions. Well, that may or may not be, but it's not really critical to deciding the case today because there is no allegation that the IRS personnel who examined the information which they submitted to the IRS with the expectation that it be examined was not examined by the people who were responsible for making decisions on their applications.

There are multiple flaws with their theory. Their real complaint, and we're assuming today for the purposes of the hearing that the IRS shouldn't have asked for all the information it did ask for; if we ever have to, we'll come back and show you, yeah, we actually did need this information, but we're not here today to do that. We will assume that the IRS asked for too much information. That all has to do -- and the length of time it took, the questions that are asked, all of that has to do with the gathering of information. It has nothing whatever to do with the handling of the information once it was obtained by the IRS. Even when it comes to the inspection theory, they don't give us allegations of which

agents supposedly wrongfully inspected which documents. They must concede that at least some of the documents they submitted were proper ones for the IRS to look at. Crucially, they cannot get past the statutory exception in 6103 that when a taxpayer submits information to the IRS with the request that it be examined, that when the IRS does so, that's not wrongful inspection. It stands to reason, I mean, that is really -- it gets to the heart of what we're talking about.

Let us consider the cause of action they're really asking for this Court to create for them. In the future in any audit, if a taxpayer supplies information requested by the IRS and then once the agent has received it and looked at it, the disgruntled taxpayer can now turn around under 7431 as expanded and bring suits saying that was a wrongful inspection, I want some damages. Your Honor, that is not the law and it should not be the law.

In addition, there is a substantial body of case law, most recently in the Wilkerson case in the Fifth Circuit and the Dean case out of the Third Circuit cited in our briefing, which holds that even if the underlying activity by the IRS is later found by a Court to have been inappropriate, that does not taint the information that was received by the IRS as part of that process. Those two Circuits in their opinions say they are aligning themselves with what they consider to be the majority view on that subject. There's not controlling

authority that we're aware of for this Court, but we think this Court, if it has to go that far in the process, ought to align itself with that very sensible majority view.

Finally, they have some allegations about duress and no real choice. In a way, this gets back to what we were talking about at the end of the discussion of Count 2. They said once we filed our application, we had to provide this information or suffer consequences. Well, certainly in the context of Count 3, there is nothing in 7421 that talks about either of those two issues. And what the plaintiffs are doing, once again, is asking this Court to step beyond the statutory language and create some new remedy that was not provided by Congress.

All the allegations in this complaint, Your Honor, really center on the question of alleged wrongful targeting of certain groups by the IRS. Whether there was or whether there wasn't is not an issue this Court has to decide today. What the Court has to decide after we're through today is whether that activity, taken as true for these limited purposes, actually provides them with a cause of action under the Privacy Act, a way to get around the Anti-Injunction or the Declaratory Judgment Act, or a way to somehow expand 7431 to create a new remedy that is not there now. None of those things exist, and the portions of this case relevant to what we're calling the federal defendants should be dismissed.

THE COURT: Thank you, Mr. Hartt.

Mr. Greim.

MR. GREIM: Your Honor, first I want to address the Texas Public Policy Foundation argument. There was a claim I noted in the reply brief that they had not got a response -- not received a response to their footnote in which they suggested we did not have enough specificity alleged on the Texas Public Policy Foundation. In an 80-page brief, it's a little bit difficult to respond to every footnote, but actually on page 73 without naming Texas Public Policy Foundation, we argue about the level of evidentiary detail that is necessary to state a 6103 claim. We cite case law, and then we actually cite the parts of our complaint, the paragraphs where we did talk about the Texas Public Policy Foundation disclosures, and there, certainly there was enough alleged. We alleged when it happened. We allege what the return information was that was disclosed. It was donor names. We alleged that they were disclosed from a Form 990. And, you know, short of knowing the name of the agent who disclosed it, which we can't know yet, that is enough. I mean, that certainly provides the government notice of what we're claiming happened to the Texas Public Policy Foundation. And so, you know, the allegations are in there.

Let's turn to the rest of 6103. The government repeats a few arguments it makes in its brief and its reply

brief, but I want to make sure that the Court has the full picture on the law.

The first point that is very important is that inspection is definitely a separate part of the statute. It's a separate violation. Now, the government very cleverly relies upon a line of cases where people have tried to piggyback 6103 claims on top of other wrongful conduct. And so, well, remember we talked about the wrongful levy statute. You can actually sue somebody for wrongful levy. And what often happens is somebody will -- somebody's bank or their credit union will get a notice from the government saying here's the taxpayer, here's the money we think they have, and here's how much they owe. Well, that's return information. And the problem is there is a bunch of administrative exhaustion required before you get to sue under that statute, so people try to skip that. And they just said, well, you did disclose return information on the wrongful notice of levy, so we'll just call this a wrongful disclosure because the underlying notice of levy was wrongful. And the Court said no, no, no, no. This information is always disclosed on a notice of levy, and so there's nothing independently wrongful about putting it on here. The problem was that you sent out the notice of levy in the first place. That was wrongful. There's a separate remedy. Go pursue them there.

But the government goes way beyond those cases and it

says, well, actually, if the -- if there was some wrongful conduct that led to the wrongful inspection, you know, you can't go forward on wrongful inspection. But remember what happened in this case. The allegation is that there was a wrongful gathering. We say that, and there was, but it could have stopped there. It did not stop there. And so a separate independent decision had to be made to wrongfully inspect the information it had gathered. Frankly, it doesn't matter in some ways, at least on this particular statutory claim, exactly where they got it from. What matters is that they had it and that they wrongfully inspected it.

And there actually are allegations about this. The government says, well, there's no allegations at all about, you know, any other people other than the people working on the application who looked at this. Well, maybe we're looking at a different complaint, but the complaint does allege this in several instances. First of all, it talks about Carter Hull supervising the cases at each step. He reviewed information from the taxpayers. No decisions were to go out of Cincinnati until the applications went all the way through the process in Washington, D.C. Those are not the line workers at that point reviewing the responses from the taxpayers.

THE COURT: But don't they have a right to inspect? I mean, I'm losing you here. If they have -- whether they rightfully or wrongfully get the information, once they get it,

they have a right to inspect it; right?

MR. GREIM: No, they don't, if it's information that they're not supposed to have in the first place. You know, it's sort of like -- I'm trying to think of an analogy to another part of law.

I mean, they could have wrongfully requested it. It comes in, and somebody says, what did you send out, let me look at that. Oh, okay. So you sent out these requests; they sent all this stuff back. No, you know, we're done. We are not going to forward it up to Washington, D.C. for them to review it, come up with new questions off of it; but that's what happened in this case. So --

THE COURT: So it's the forwarding of it for people in Washington to inspect that's --

MR. GREIM: At a, yeah, at a minimum it is. It's for Carter Hull to inspect. Another part of our, and I'm quoting from paragraph 110 of our complaint, this is -- there was a reference that the -- they redacted parts of this, unfortunately, but the information "will be ready to go to Judy soon." That's Judith Kindell, Lerner's chief technical assistant. So it's several spots we alleged inspection by higher-up D.C. workers after the initial agent received it and it came in the door.

And then finally, Lois Lerner saying to Holly Paz: "Cincinnati should probably not have these cases. Holly,

please see what they have, please." I guess there's two "pleases" there.

But at any point, we've adequately alleged that the materials came in, let's say they came across the agent's desk, it said, "Send your stuff back to Stephen Seok," then they were pulled up to Washington, D.C.

THE COURT: And that's the violation, once it went to Washington.

MR. GREIM: It's a wrongful inspection, yes.

Now, we don't have the facts on this.

THE COURT: The IRS agent here could look at it.

MR. GREIM: Well, let's say -- I would say this: I don't think I have a position on whether the wrongful inspection might simply be the IRS agent who wrongfully gathered it, saw what it was, and then sent it back. Has opening the envelope crossed the line? I don't think we have to answer that question. I think we could say if it sits around for 13 months and then you go back and review through all of the First Amendment protected items, that's a violation. And I think we can definitely say that sending it up to people, to a lawyer in Washington, D.C., Carter Hull, to look through that information and then give you advice about what follow-up questions to ask, they're still inspecting that information.

Now, one of the issues is was it really wrong to even have this. And we heard some skepticism that, you know, we'll

show that they needed all this information. But, again, the IRS has already admitted that seven of these questions, and I keep coming back to number one which is the request for donors, that all that was unnecessary for tax administration purposes. And I suppose we might get into a debate later in this case about whether maybe the IRS wrongfully admitted that. Maybe the Inspector General was wrong and the government in this case will prove that it really needed all the information in these disclosures. We don't think -- we think that that issue is foreclosed. But the point is it's a motion to dismiss. We have alleged it. We have alleged the Inspector General's statement of those seven things they didn't need to ask about, and that is what our return information claim is keyed to. It's they shouldn't have asked for it, but in particular, they should not have inspected it. They should not have inspected it, and we, again, we have allegations that they did so.

Your Honor, at the end of the day, this case, it's interesting because we've gone through a wide range of statutes, only two of which we're trying to go under here. We've got the Bivens claim, but the real question in this case is can it be that 6103 and the Privacy Act and Bivens, that none of them apply. You know, given the facts that are pled here, the actual delay that definitely happened, the viewpoint based pulling people out that actually happened, whether you want to call it targeting or not, that's objectively what we

believe it is, but taking those facts as they've been alleged and then people actually being burdened by all that, is it really, really true that federal courts have nothing to say about this. Is it really true that the Constitution and these other statutes have nothing to say about this. And the answer from the defense today seems to be yes, there is nothing we can say about it; it's all just a political matter; it's just a media -- a media storm. Is that really what we expect from the IRS, is that what we really expect as citizens that go into federal court. We believe the answer to that is no, Your Honor.

The claims should not be dismissed.

THE COURT: Thank you, Mr. Greim.

Mr. Hartt. You may proceed.

MR. HARTT: Thank you, Your Honor.

Mr. Greim admits that in their 80-page response, they didn't have any room to provide the specifics we asked for about the Texas Public Policy Foundation. He says if you look at page 73, that's where you'll find it. I went back and looked at it. I sure don't see it. I'm sure the Court at a convenient time can look at 73, 72, 74, or wherever else and make its own decision on whether they provided the specifics about Texas Public Policy Foundation and the alleged wrongful disclosure.

But to be clear, what we said in our briefing was you

have no allegations about how this information was released, no allegations about to whom it was released, and you don't allege anything about whether the IRS is the source of what you called media reports. I don't see it. Maybe somebody else does. But look at it and let the Court -- the Court can make its own decision.

There's nothing involving that plaintiff, however, about targeting, about any of the other issues we've been talking about. And even if, even if the Court should decide as to that one plaintiff and that one issue there's something left over to litigate, that really is a bilateral case between the Internal Revenue Service and TPPF, and they ought to be litigated back in Texas because there's certainly no connection whatever to -- even if it happened here in Cincinnati.

The other point, and this is really huge, we've said you didn't give us any details about wrongful inspection. They came back and they've said, I guess admitted now, that as at least to the line employees, I understand what they've said, there's not any wrongful inspection. That's a step in the right direction.

But then they say, wait a minute, how about the people up the line. Carter Hull is mentioned specifically. The people up the line should not have inspected this when it was sent to them by the people down below them. That is a staggering argument, Your Honor, breathtaking really. No one

has ever suggested that a supervisory employee has to be on guard about looking at something that a person below him or her sent up. That has certainly never been the law as far as I'm aware. And once again, we don't think the Court ought to go out and create that kind of a brand new remedy because that is -- that would turn administration of the Internal Revenue Service and perhaps other parts of the government really on its head. Supervisors have to be able to review and look at what the people down below them are doing or they can't supervise. In fact, I kind of think that goes to the heart of what they're saying because they're complaining about the supervisors. Well, if the supervisors don't have any interaction with the people down below them, how are they supposed to have committed the wrongful acts they complain about other parts of this complaint? This is just beyond the pale.

Mr. Greim said we can have debates on this later in this case. No, Your Honor, I don't think we should because this case should be over now.

THE COURT: Thank you, Mr. Hartt.

Anything else, Mr. Greim?

Peggy, anything?

MR. GREIM: I did have one, one thing.

THE COURT: Okay. Go ahead.

MR. GREIM: On the -- Your Honor, I'm just afraid that we got away from the actual allegations in the complaint with

Mr. Hull. This was not a situation where Mr. Hull was actually the supervisor and one day a bunch of information came into his office that he was curious to look at and see what it was. We have alleged that he directed the lower-level agents to go get that information, and then they having got it, he reviewed it, which is very different from a supervisor accidentally opening a manila envelope from Cincinnati and find themselves liable under 6103.

THE COURT: Anything?

MS. FECHTEL: I want to ask a question back --

THE COURT: Go ahead. Okay. Of which lawyer?

MS. FECHTEL: I think both.

Going back to Count 2 and the allegation that there's only two of the groups have applications pending. First, Mr. Hartt, is it your position that those are the only two plaintiffs that can be stating a claim under Count 2?

And then, Mr. Greim, is it your position that all ten plaintiffs in fact are stating a claim under Count 2, which looks iffy at least as to Texas Public Policy Foundation if they weren't actually a part of this targeting scheme?

MR. HARTT: To answer your question, yes, only those two plaintiffs plausibly come within the cause of action they're trying to advance under Count 2 with respect to enjoining the Federal Government.

And so we're clear, we think there are other reasons

why even as to those two they don't get anywhere, but these people who have -- the eight other plaintiffs, the six who have been granted, the eight -- the two, I'm sorry, who withdrew, they got their applications through the process. But if targeting happened, may have happened, but there's nothing to enjoin at this point.

MS. FECHTEL: Is there a claim for declaratory relief and is there a claim for damages?

MR. HARTT: I didn't understand them to be seeking damages against the government in Count 2. Under the Privacy Act in Count 1 and under the 6103, 7431, they're seeking damages against the government, but not in Count 2.

MS. FECHTEL: Thank you.

THE COURT: Mr. Greim?

MR. GREIM: The plaintiffs who have already moved through the process have no claim about what already happened to them. They can't seek injunctive relief about what already happened. So it would be the two groups, and AAOL, I always remember that one, I'm forgetting the other one right offhand, but those are the two groups that still would have a claim for declaratory and injunctive relief. And we've pled them as the representatives of the class of the many other groups who are also still waiting.

MS. FECHTEL: Thank you.

MR. HARTT: For clarity, the other one, I believe, is

Texas Patriots Tea Party.

THE COURT: Anything?

All right. Anything else from counsel?

Well, thank you very much for the arguments. The Court will take this entire matter under submission and rule as soon as possible.

Mr. Greim, I marked your overhead as Plaintiffs' Exhibit 1 to this hearing. Is that --

MR. GREIM: You know, we should probably mark the other one too, the legislative history.

THE COURT: Okay. Then we need -- then you need to give us --

MR. GREIM: I'll do that.

THE COURT: -- copies. So that's clear.

MS. FECHTEL: And that will get put into CM/ECF?

THE COURT: Yes.

(Proceedings concluded at 1:03 p.m.)

- - -

C E R T I F I C A T E

I, Julie A. Wolfer, the undersigned, do hereby certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

s/Julie A. Wolfer
Julie A. Wolfer, RDR, CRR
Official Reporter